



Legal Vice Presidency
The World Bank

Legal Aspects of International Trade



Proceedings of a World Bank Seminar

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Foreword

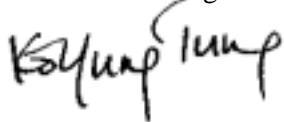
WITH the WTO fourth ministerial conference just round the corner, preparations in view of launching the next round of trade negotiations are in full swing. While memories of Seattle linger on, it is the agenda of a possible next round of negotiations which continues to focus the attention of trade delegates. The publication of the proceedings of the recent seminar on international trade sponsored jointly by the World Bank Legal Department (LEG) and the World Bank Institute (WBI) could not have come at a more opportune time.

The seminar took place on October 24 – 25, 2000. It was the first ever seminar on international trade sponsored by LEG. Its purpose was to take stock of the state of existing multilateral trade rules and review the outlook for the next round of negotiations, with particular emphasis on their implications from a legal perspective for developing countries. The seminar also sought to discuss the role, if any, that the Bank could, or should usefully play in the process.

By all accounts, the seminar was a lively and successful event. It provided a much needed opportunity for debate among Bank staff, academics and trade delegates from both developed and developing countries on matters of mutual interest relating to trade. Participants repeatedly referred to the complexity of international trade rules and the need for the Bank and others to provide assistance to developing countries to empower them to participate in the process of international trade. They welcomed LEG's interest in this area and looked forward to more such opportunities in the future.

Trade is an important part of the Bank's development mandate—trade is a key driver for economic development and poverty alleviation for many developing countries. Like the rest of the Bank, LEG plans to remain actively involved in this area. A second international trade seminar is planned next year. By that time the ministerial meeting will have been held, raising new developments to analyze, and new challenges to address. In the meantime, it is my hope that last year's seminar materials will serve as a valuable resource to address some of the issues which are critical to our members.

Let me take this opportunity to thank all those who contributed to the success of the seminar, including the speakers and participants themselves, and my colleagues of LEG and WBI who made it possible to have the seminar in the first place, as well as those of them who arranged to have its proceedings published.

A handwritten signature in black ink, appearing to read 'Ko-Yung Tung'.

Ko-Yung Tung
Vice President and General Counsel
The World Bank

Acknowledgement

THE Legal Vice Presidency seminar on the legal aspects of international trade was held in October 2000. It was the first ever seminar on international trade to be sponsored by the Legal Vice Presidency. The seminar was made possible by a multidisciplinary team of dedicated colleagues from within and outside the Legal Vice Presidency, who spared no effort to make it happen. As we prepare to publish the proceedings of the seminar, it is also appropriate to recognize the efforts of those who contributed to make it a success and to have its proceedings published.

First and foremost, we wish to extend our sincere thanks and appreciation to all those who volunteered to serve on the planning committee. A core group of members of the committee also volunteered to double up as moderators during the seminar. In terms of the intellectual guidance and quality control for the seminar that the moderators provided, they had a vital role to play and they played it well. The names of the moderators are indicated elsewhere in this publication. They all deserve to be commended for their role.

Julie Bockarie, Yahaya Doka, Teresa Genta Fons, Isabel Mignone-Del Carril and Scott White were constantly on hand to share their considerable expertise in the organization of training seminars. I would fail in my duty if I did not acknowledge their unwavering support during this process. Rosemary Thompson-Elhosseine and Dolie Schein also distinguished themselves on account of the able support that they both provided in terms of the logistics of the seminar and the publication of its proceedings, re-

spectively. For the solid, dependable and relentless support that they provided, we can only record our deepest appreciation.

Last but not least, we owe a deep debt of gratitude to our guest speakers and participants without whose active presence and participation, the exercise would not have been possible. As we prepare for our future events in this area, we know that we can continue to count on their support.

Raj Soopramanien

Senior Counsel

Africa Practice Group, Legal Vice Presidency

The World Bank

Opening Address

KO-YUNG TUNG

*Vice President and General Counsel
The World Bank*

IT is my pleasure to open this seminar on legal aspects of international trade. I would like to thank you all for coming here to participate in this seminar. This is the first major treatment by the Legal Vice Presidency of the World Bank of international trade rules, their impact on economic growth and poverty reduction.

At the World Bank, we seek, through economic development, to alleviate the crisis of poverty still facing many countries. The international community, at the World Summit for Social Development, made progress on committing to eradicate extreme poverty, substantially reduce overall poverty, and develop national plans, which address these goals. In 1997, the international community proclaimed the inauguration of the First United Nations Decade for the Eradication of Poverty and set the target date of 2015 reduce extreme poverty by 50%.

The strategies for poverty reduction which the Bank follows, reflected in its Comprehensive Development Framework, is based on rapid economic growth oriented to achieve outcome-related goals, is country-driven and encourages the broad participation of civil society, elected institutions, key donors and relevant IFIs. In addition to large-scale capital improvement projects and infrastructure development, the Bank also engages in a wide range of education, training, policy advice, strengthening of legal and regulatory frameworks, and community development programs.

Yet, even while economic growth has been robust in many countries, the absolute level of extreme poverty in recent years has not improved overall. The percentage reduction of the population of developing and transition economies living in extreme poverty — defined as less than \$1 per day — has dropped by 3 to 4 percent over the last decade, taking into account population increases, yet, the actual number of people living in extreme poverty has remained roughly constant, at approximately 1.2 billion, and the number worldwide of those living under \$2 per day is estimated at 3 billion — encompassing nearly half of the world's population. Amidst this poverty, it is estimated that some 790 million people suffer from malnutrition while 140 million school age children do not go to school and 900 million adults are illiterate. Those hardest hit by poverty are women, children, ethnic minorities and indigenous peoples. The numbers vary significantly according to region, with the East Asia and Pacific region experiencing the most dramatic improvement in extreme poverty despite the East Asian financial crisis, while the Sub-Saharan Africa, South Asia, Eastern Europe and Central Asia, and the Latin America and Caribbean regions have experienced significant increases in numbers of people living in extreme poverty. And the prospect for changing this pattern of stasis or even worsening of extreme poverty does not appear positive according to World Bank estimates if we continue on the same path.

What are the underlying obstacles to reducing the numbers of people struggling in extreme poverty? We have seen that economic growth in a particular country may not positively impact or may even aggravate income inequities because of social and participatory conditions. Securing fair distribution of benefits requires addressing inequities in educational opportunities and in access to essential services such as health care and the legal system, to fundamental resources such as clean water, and to enjoy a clean and protected natural environment. Inadequate representation and inequitable opportunity for participation underlie the distribution of and access to benefits issue. Empowering the poor and improving community, individual and, in particular women's participation in the governance decision-making process, and strengthening institutions of governance therefore must be a parallel strategy goal to economic growth.

Trade expansion and liberalization result in faster sustainable economic growth, which, in turn contributes to poverty alleviation

as long as the other elements of civil society that I have mentioned are entrenched or simultaneously developed. International trade is a particularly important element of development strategies for three reasons. First, trade has been shown to be far more important than aid programs to long-term sustainable economic development, having the potential to generate substantially greater economic growth and ensuring domestic ownership of the process of development. Second, developing countries have a comparative advantage for manufacturing and production of, and therefore of trade in some products because of lower labor costs. And third, the agricultural export capacity of developing countries is already established or can be expanded with relative ease due in part to the labor-intensive aspect of agricultural production in developing countries. Liberalization of trade rules have the potential, therefore, to contribute to the expansion of export opportunities and import competition, stimulate small-scale enterprises and traditional and non-traditional agricultural export production and processing in developing countries. And trade expansion can address poverty on both country-wide and community levels. On the national level trade expansion can contribute to national debt reduction. Increasing competition through participation in multilateral trade can result in reduced prices to consumers and stimulate the domestic economy. Furthermore, expanded opportunities for local communities to engage in economically productive production can result in income improvement for the very poor.

Trade expansion has been one of the most dynamic features of the globalization process in recent years and developing countries have played a significant role. They now account for about one-third of global goods exports, and nearly one-quarter of services exports. However, developing countries face comparative disadvantages due to the current design and implementation of the “rules of the game” in international trade.

The GATT, needless to say, was intended to create a liberal and open trading system, and the Uruguay Round added new multilateral agreements, thereby considerably expanding the scope of international rules on trade in goods and services. The rules and permissible exceptions to the rules in relation to tariffs, non-tariff barriers to trade and subsidies – while they contribute to unprecedented trade expansion and economic growth within an acceptable comfort zone of protectionist policy measures among developed

countries, also have the unintended effect of restricting market access and defeating fair competition for developing countries. Developing countries argue that trade liberalization under the GATT targets trade in such goods which are primarily produced by developed countries, while the tariffs remain high and quota restrictions remain restrictive and subsidies persist on certain goods, including textiles and other products, and particularly agricultural products — that are the mainstays of developing country exports. Developed countries argue that protectionist rules for agriculture protect a basket of legitimate national policy interests, including food safety, environmental protection and protection of the livelihood of the domestic agrarian sector.

Addressing poverty in developing countries thus will require a special focus on agricultural trade rules. Agriculture accounts for 35 percent of the least developed countries' GDP, compared to 17 percent for lower middle-income countries and 8 percent for upper middle income developing countries. According to the United Nations, developing countries stand to lose approximately \$700 billion a year as a result of permissible protectionist measures.

Additionally, although developing country membership in the World Trade Organization has risen rapidly in recent years, this has not resulted in marked increased influence in rules decision-making. Many developing countries do not have the resources to support having any or more than very few, and possibly underequipped representatives in Geneva. As a result, the rules of the game continue to be set by the better-represented developing countries and on the basis of developed country models, which can be prohibitively expensive for poor countries to abide by and implement.

The World Bank assists developing countries to expand their participation in international trade in three principal ways. First, the Bank finances projects targeting infrastructure, institutional capacity, and private sector development. Second, the Bank offers policy advice to member countries to assist in strengthening their macroeconomic policies and facilitates trade liberalization, with emphasis on tariffs and non-tariff barriers, trade restrictions and capital movements. Third, the Bank provides technical assistance to strengthen member countries' capacity to participate in trade negotiations and other international trade fora. Through this seminar, we hope to explore additional areas or further refine existing areas in which the Bank is or can be engaged to improve international trade opportu-

nities in relation to poverty alleviation in developing countries.

Honored participants, I have tried to open the discussion and lay out some of the core elements of the importance of trade in a development strategy with the goal of poverty reduction. I welcome you to this seminar and look forward to the elaboration of this theme in the panel discussions and your lively participation.

Thank you very much.

Introductory Remarks

RAJ SOOPRAMANIAN

Senior Counsel

Africa Practice Group, Legal Vice Presidency

The World Bank

Introduction

THE purpose of this seminar is to take stock of the state of existing multilateral trade rules and review the outlook for the next round of negotiations, with particular emphasis on their implications from a legal perspective for developing countries. The seminar also seeks to discuss the role, if any, that the Bank can - or should - usefully play in the process.

Exactly one year ago, the world was preparing for the WTO third ministerial conference in Seattle. Seattle was to have served as the launching pad for what some referred to as the Seattle or Clinton round, but which others preferred to call simply the Millennium or Development round. But the Seattle meeting collapsed in acrimony, and delegates stood by in horror, as a new form of globalization took shape: a global coalition of anti-globalization street protesters who went on from Seattle to pursue their campaign, first, in Washington D.C. in the spring of 2000 and, more recently, in Prague.

But it was not just the violence of the protests which accounts for the failure of the Seattle ministerial conference. Even more importantly, there were fundamental differences amongst the delegates themselves on a number of issues which have been cited as some of

the contributory factors to the collapse of the meeting, namely: market access, agriculture, labor standards and anti-dumping.

Outstanding Issues

MARKET access is one of the main issues which divide developed and developing countries. Developing countries argue that, although there have been significant reductions in tariffs under GATT, most of the reductions have occurred in areas which are not of significant economic interest to developing countries. Conversely, in areas which are of interest to developing countries, such as agriculture and textiles, tariffs remain high and even prohibitive in certain cases, and quota restrictions or tariff quotas continue to apply. Market access is the subject matter of the opening session of this seminar.

Labor standards are another issue which continues to divide developed and developing countries, in particular. The matter appeared to have been laid to rest at the second ministerial conference in Singapore, where members agreed to “reject the use of labor standards for protectionist purposes”, adding that “economic growth and development fostered by increased trade and further liberalization contribute to the promotion of these standards.” Under pressure from labor organizations in their respective constituencies, several member countries are pressing, not just for compliance with labor standards, but for a linkage between free trade and compliance with labor standards under the auspices of WTO. Not surprisingly, developing countries have argued that such a linkage is just a guise for protectionism. Labor standards will be the subject matter of today’s lunchtime panel discussion.

Anti-dumping is the subject matter of a continuing dispute between the US and Japan, in particular. Anti-dumping rules are used to impose tariffs on imports that are sold at prices which are considered too low, according to a predetermined formula. In practice, they are used to protect domestic producers against allegedly unfair competition from imported products. This afternoon’s panel discussion will focus not only on anti-dumping but also on subsidies,

which have been the subject matter of several major disputes which the WTO dispute settlement mechanism has had to adjudicate upon in recent times.

DSU, GATS AND TRIPS

THE existence of a strong and credible dispute settlement mechanism is a necessary condition for the establishment of a just and workable multilateral trading system in which business enterprises from member countries can trade with one another under conditions of fair competition. The Dispute Settlement Understanding (DSU) is in this respect one of the critical achievements of the Uruguay round. It removes some of the weaknesses of the previous GATT dispute settlement mechanism, including the rule of consensus which made it all but impossible to adopt panel reports. Tomorrow's breakfast panel discussion will focus on a review of the WTO dispute settlement mechanism.

In addition to the DSU, the Uruguay round also produced the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The purpose of GATS is to promote the economic growth of trading partners and the development of developing countries through expansion of trade in services. It is estimated that services currently account for not less than 20 percent of total world trade. Due to rapid technological progress, the share of services in world trade is expected to expand rapidly, and even to overtake that of goods within the next 10 years. GATS and its relevance to the developing world will be the subject matter of tomorrow morning's second panel discussion.

The purpose of TRIPS is to give adequate and effective protection to intellectual property rights (IPRs) and, in so doing, encourage creativity and innovation, promote the transfer of technology and protect consumers. TRIPS lays down minimum standards for the protection of IPRs as well as procedures and remedies for their enforcement. Failure to enforce such rights encourages trade in counterfeit and pirated goods, thereby damaging the legitimate commercial interests of manufacturers who hold or have acquired these

rights. Developing countries complain about the high cost of TRIPS and their limited capacity to ensure TRIPS protection. The impact of TRIPS upon developing countries will be the subject matter of tomorrow afternoon's first panel discussion.

Trade and Environment

THE WTO is not an environmental agency, but many of its basic agreements include provisions dealing with environmental concerns. It has no agreement dealing with the environment, but some of the key objectives of its charter are sustainable development and environmental protection. There is general recognition that the pursuit of the trade liberalization agenda cannot be undertaken at the expense of the environment.

For lawyers, in particular, the treatment of environmental considerations by organs of the WTO raises interesting and at times challenging questions, including that of the relationship between WTO agreements and multilateral environmental agreements (MEAs). There have been several actions affecting trade which have been challenged already before the WTO dispute settlement mechanism and its predecessor under the GATT. None, however, involved an action taken under an MEA. Is WTO the appropriate forum to decide questions affecting trade arising under an MEA to which both parties to a dispute are signatories? What if only one of them is a signatory to the MEA? Is the WTO the only appropriate forum by default? These are some of the questions which will be addressed in the course of our second panel discussion of this morning.

Regional Integration

THE failure of the Seattle ministerial conference did nothing to reduce WTO member countries' appetite for trade liberalization. Even as countries gear up for the next round for trade negotiations, regional integration continues to feature prominently in the agenda of countries not only in Europe and North America, but also in Asia, Africa and Latin America. Although regional inte-

gration is generally regarded as one of the key exceptions to the MFN rule under Article XXIV of GATT, some prefer to regard it as one of the building blocks of multilateral trade and a complement – not an alternative – to a global trading system. Tomorrow's first panel discussion will focus on the merits and challenges of regional integration in a globalized world.

Conclusion

THIS seminar brings together speakers and participants from across the globe, and representing different interests and different perspectives. We welcome them all, and we look forward to the presentations and to the active participation of both panelists and participants. Bearing in mind that the purpose of the seminar is not only to take stock of the state of existing multilateral trade rules and review the outlook for the next round of negotiations, but also to consider the role, if any, that the Bank can - or should - usefully play in the process, we will look forward to any constructive advice, guidance and suggestions that panelists and participants will have for the Bank and, in particular, its legal department in this regard.

Market Access

Legal Techniques to Enhance Developing Countries' Access to Global Markets

MODERATOR: ISABELLA MICALI DROSSOS, THE WORLD BANK

Proposed Legal Regime within the World Trade Organization on Enhanced Market Access Conditions for Least Developed Countries

BONAPAS ONGUGLO

Economic Affairs Officer
UNCTAD

TAISUKE ITO

Associate Economic Affairs Officer
UNCTAD

THE Membership of the World Trade Organization (WTO) in particular and the international community in general has been discussing since 1996 a proposal on increased market access conditions in the form of duty-free and quota-free access for imports originating in Least Developed Countries (LDCs). This is seen as an important step forward in addressing effectively the concerns of the weakest members of the multilateral trading system over their continued marginalization in the system. It would also build confidence and credibility in the system's ability to respond to the needs of the LDCs. Two sets of issues need to be addressed so as to render the proposal operational. First, issues pertaining to the real value of the market access proposal needs careful study. Second, the legal framework within the WTO which would provide justification for the proposal as compatible with its disciplines has yet to be considered. This paper provides a suggestion in this regard in the form of a Protocol to the General Agreement on Tariffs and Trade 1994, which was first suggested in a technical report by the UNCTAD Secretariat. Section I provides a background to the origin and state of play as of July 2000 regarding the proposal on

enhanced market access for LDCs. Section II discusses alternative options that could be considered for a legal WTO framework for enhanced LDCs market access, and recommends a Protocol to GATT 1994. Section III provides a possible draft model legislation of the proposed Protocol. Section IV assesses the proposed Protocol's main features and weaknesses. The paper concludes in Section V that further analytical work by UNCTAD, the World Bank and international organizations is needed to analyze the feasibility of the legal regime and the real value of the market access proposal for LDCs. These organizations should also continue to provide capacity building assistance to LDCs to enable them to be effective players in the multilateral trading system.

Proposal on Enhanced Market Access Conditions for LDCs

AT the G-7 summit meeting in Lyon (France) in 1996, Mr. Renato Ruggiero, the then Director General of the World Trade Organization (WTO), proposed to the assembled countries the removal of all tariffs and quotas on imports from least developed countries (LDCs).¹ Since then the WTO membership in particular and the international community in general have been discussing the merits of the proposal on increased market access for LDCs, and the modalities for rendering operational the proposal. The First WTO Ministerial Conference in Singapore (9-13 December 1996) reached consensus on the merits of the proposal and endorsed it.²

¹ There are 48 LDCs so designated by the United Nations General Assembly and 29 of them are WTO members as of June 2000. The following are the WTO members: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, The Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Sierra Leone, Solomon Islands, Togo, Uganda, United Republic of Tanzania and Zambia. The other 19 which are not WTO members are Afghanistan, Bhutan, Cambodia, Cape Verde, Comoros, Equatorial Guinea, Eritrea, Ethiopia, Kiribati, Lao People's Democratic Republic, Liberia, Nepal, Samoa, Sao Tome and Principe, Somalia, Sudan, Tuvalu, Vanuatu and Yemen. Cambodia, Lao PDR, Nepal, Samoa, Tonga and Vanuatu are undergoing WTO accession process while Cape Verde and Ethiopia have indicated their desire to accede to the WTO.

² WTO, Singapore Ministerial Declaration (Adopted on 13 December 1996, WT/MIN(96)/DEC); paras. 5 and 14.

Moreover, as a follow up to the conference's recommendations on arresting the marginalization of LDCs and on enhanced market access, a High-Level Meeting on Integrated Initiatives for Least Developed Countries' Trade Development was held in October 1997 in Geneva (Switzerland) under the WTO's auspices. At the meeting a number of developed and developing countries announced their decision or intention to grant, on an autonomous basis, preferential or duty-free access to selected export products from LDCs. These concessions would be provided within the context of existing preferential schemes such as the GSP (Generalized System of Preferences),³ or a form of "GSP for LDCs" in the case of the advanced developing countries; or within the context of regional or international trade agreements. The EU, for example, has extended commercial treatment provided to LDCs members of the ACP (Africa, Caribbean and Pacific) Group to all LDCs in Asia from 1 January 1998.

The Second WTO Ministerial Conference in Geneva, Switzerland (18 and 20 May 1998), reiterated the commitment of Members "to continue to improve market access conditions for products exported by the least developed countries on as broad and liberal a basis as possible."⁴ It also identified as one of the priorities for the Third Ministerial Conference in Seattle, United States (30 November to 3 December 1999), "recommendations on the follow-up to the High-Level Meeting on Least Developed Countries."⁵ Accordingly, as part of the preparatory process for the conference, various proposals had been submitted by both developing and developed countries as well as LDCs themselves on market access conditions for LDCs.⁶ Drawing upon these proposals, the following specific suggestion was incorporated (in paragraph 72) by the Chairman of

³ For a review and update on changes in GSP schemes following the conclusion of the Uruguay Round of multilateral trade negotiations, and announcements and progress on market access concessions offered to LDCs by developing countries, see for example the first four editions of the "GSP Newsletter" prepared by the UNCTAD Secretariat and available on the UNCTAD website on the internet <http://www.unctad.org>.

⁴ WTO, Ministerial Declaration (Adopted on 20 May 1998, WT/MIN/(98)/DEC/1); para. 6.

⁵ Ibid, para. 9(c).

⁶ For example see the declaration adopted in Sun City South Africa in June 1999 by the Co-ordinating Workshop for Senior Advisers to Ministers of Trade in LDCs in preparation for the Third WTO Ministerial Conference on "Integrating Least Developed Countries into the Global Economy: Proposals for a Comprehensive New Plan of Action in the context of the Third WTO Ministerial Conference."

the WTO's General Council into the Seattle "Ministerial Text: Revised Draft" (Job(99)/5868/Rev.1(6223)) which he presented to Members on 19 October 1999: "extend [bound,] duty-free, quota-free market access for [all] products originating in least developed countries;"

The provisions on "bindings" and on "all" product coverage lacked broad agreement, especially among the developed countries, and thus they were placed in square brackets.

Following the setback at the Seattle conference with no concrete result on any of the objectives mandated by the Geneva Ministerial Declaration including that on LDCs, work resumed within the WTO Membership to elaborate modalities for setting into motion the proposal on enhanced market access conditions for LDCs. Concrete progress in this area was seen as essential for rebuilding confidence in the multilateral trading system among its membership, especially among its most weakest and vulnerable constituency. In this direction a joint proposal was submitted in March/April 2000 to the WTO Membership by the Quad countries (Canada, EU, Japan, United States) and the market access proposal was as follows⁷:

- Developed Country Members shall provide least developed Members with enhanced market access by according and implementing tariff-free and quota-free treatment, consistent with domestic requirements and international Agreements, under their respective preferential schemes, for essentially all products originating in least developed countries so far as they remain in that category.
- Developing country Members shall, to the maximum extent possible, also provide least developed Members with enhanced market access including by extending tariff-free and quota-free treatment consistent with domestic requirements and international Agreements, or by providing preferential treatment for essentially all products originating in least developed countries as far as they remain in that category.
- Members will notify, without delay, their actions taken consistent with their domestic requirements to the Committee on Trade and Development.

⁷ "Draft Decision Establishing a Plan of Action in Favour of Least Developed Countries and a Revitalized Program for Technical Cooperation" in Elements for rapid action in the WTO (31.3. 2000, Quad countries).

The Quad proposal however provides little improvement over the pre-Seattle position of these countries. It proposes that the concessions would cover “essentially” all products and these would be provided within the framework of their existing preferential schemes,⁸ meaning the autonomous schemes such as the GSP. There is thus continuing divergence between developed and developing WTO Members on the scope of enhanced market access conditions for LDCs.⁹

The key issues regarding better market access conditions for LDCs can be categorized into two areas. First, there are the issues pertaining to the real value of the market access concessions that will have to be analyzed in-depth, taking into account a variety of factors. These factors include (a) bindings, product coverage, longevity and applicable rules of origin; (b) assessment of the possible increase in market access opportunities in contrast with those already available to LDCs under existing preferential arrangements such as GSP, the Cotonou Partnership Agreement between the ACP Group and EU, and other unilateral, non-reciprocal preferential schemes; and (c) consideration for other measures that could hinder LDCs from effectively utilizing the increased market access conditions such as stringent sanitary and phytosanitary measures and technical product standards in their major markets.

As most LDC products already enter major industrialized markets free of duty under various existing preferential schemes, the real issue for LDCs is to what extent additional benefits are to be drawn by an inclusion of products of their export interest so far excluded from duty-free treatment by major developed countries. These include for example textile in the United States and Canada's GSP schemes, and fish in Japan's GSP scheme. Furthermore, the Quad proposal fails to mention applicable rules of origin and other

⁸ For a brief review of some such preferential schemes, see for example Bonapas Onguglo, 1999 “Developing Countries and Trade Preferences” in *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (M.R. Mendoza, P. Low & B. Kotschwar (editors), Organization of American States/Brookings Institution Press, Washington, D.C.).

⁹ In September 2000 the European Commission made an even better proposal, and called other Quad countries to follow suit, to grant duty-free, quota-free treatment for all imports from LDCs, except for arms i.e., everything but arms (EBA). Canada has also announced that from 1 September 2000, it has extended duty-free treatment to an additional 573 tariff lines from LDCs, raising the share of duty-free imports from LDCs from 82% to 96%.

technical matters such as sanitary and phytosanitary standards that have been acting as considerable impediments for products exported by LDCs, even under the most liberal market access conditions. Technical studies on the value of the market access proposal for LDCs, taking into account the non-tariff barriers and the capacity of LDCs to respond to these barriers, could be undertaken by international organizations such as UNCTAD and the World Bank with a view to assessing the viability of the proposal.

Second, the legal framework that would underpin the trade preferences for the LDCs and provide enhanced market access conditions within the WTO has yet to be considered by the WTO membership. This paper provides a suggestion in this regard, building upon proposals submitted by WTO Members and upon initial work undertaken by the UNCTAD Secretariat. More analysis could be undertaken by international organizations including the World Bank to bring further insight into the elaboration of multilateral disciplines providing the framework for provisions of enhanced market access conditions for LDCs.

Options for a Legal Framework within the WTO

AS indicated in the previous section, the legal framework which would underpin the widely accepted proposal on duty-free, quota-free market access conditions for LDCs within the WTO has yet to be considered in detail by the WTO membership. Guidance on such a framework could be drawn from the WTO Agreements which consists of (a) the Agreement establishing the WTO; (b) General Agreement on tariffs and Trade (GATT) 1994 including the various multilateral trade agreements on goods and the understanding on some of these agreements, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); (c) Dispute Settlement Understanding (DSU); (d) Trade Policy Review Mechanisms (TPRM); and (e) the Plurilateral Agreements, annexed to WTO Agreement in separated annexes 1-4. Cognizance could also be taken of the existing practice within which developed countries provide preferential market access to LDCs under their respective GSP schemes (under coverage of the Enabling Clause) or non-generalized preferences to selected beneficiaries (invoking the waiver provisions under WTO

Agreement Article IX). Hence a legal framework for LDC market access could involve a Ministerial decision, Agreement, Protocol, plurilateral agreement or a preferential unilateral scheme.

This paper recommends a Protocol to GATT 1994 on enhanced market access conditions in favour of LDCs; a model is provided in Section III and explained in Section IV). The protocol was first elaborated in a technical report prepared by the UNCTAD Secretariat for the 3rd Ordinary session of the OAU/AEC Trade Ministers Conference in Cairo, Egypt in September 2000.¹⁰ A protocol is a legal instrument that supplements and further clarifies the provisions and purposes of a parent treaty, which in this is GATT 1994. A protocol is legally binding but its contents must not be contradictory with the parent treaty. When a conflict arises between them, the parent treaty would prevail. Under GATT/WTO, each time there was a new round of tariff negotiations, the changes (amendment) in the tariff schedules or a new schedule (replacing the existing one) are indicated in a protocol attached to the GATT. The attached protocol usually contains simple provisions indicating the change. A protocol could be agreed by a limited number of signatory to the GATT 1994, but the resulting commitments would be multilateralized for the wider membership.

The term “protocol” could be interchangeable with the term “agreement” as they both provide legally binding obligations. An agreement under the WTO is multilateral trade agreement such as the Agreement on Agriculture. Such an agreement forms an integral part of GATT 1994 and thus of the WTO Agreement. This “legal bindingness” and consequently the applicability of the Dispute Settlement Mechanism (DSM) to its provisions are the major merits of a protocol or agreement. Thus the term “Protocol” could be used interchangeably with “Agreement” as it is the content and not the form of the instrument that is important. How such an instrument is called will result from the negotiations between the affected countries. Either a Protocol or Agreement thus can be the most ideal prototype legal arrangement for LDCs market access, even though both have various shortcomings.

¹⁰ See UNCTAD Secretariat, “Current Developments on Issues of Interest to African Countries in the context of Post-Seattle WTO Trade Negotiations” (6 September 2000); Box I.4. Reproduced as OAU/AEC Secretariat document with the reference OA/AEC/TD/MIN/2(III), Annex III.

The option of a Protocol to GATT 1994 (or an Agreement) as the legal regime on enhanced market access conditions for LDCs has certain weakness (discussed in Section IV). An important one is the grey area (uncertainty) as regards the applicability of the Protocol as a multilateral agreement in the WTO although the preferences are provided only to a selected group of countries, namely the LDCs, and thus violating the MFN clause. If an agreement among the WTO Membership, and in particular between the preference-giving countries on the one hand and the LDCs on the other, proves to be difficult on the proposed Protocol (or Agreement), several other options are conceivable (as discussed below).

Proposals submitted so far by WTO Members suggest a Ministerial Decision. For example such a Ministerial Decision was suggested by the Quad countries in their proposal (mentioned in the previous section) and by the Organization of African Unity/African Economic Community Conference of Ministers of Trade held in Algiers (Algeria, 20-24 September 1999).¹¹ Ministerial decisions concerning developing countries in general and LDCs in particular have been adopted by WTO Members since the conclusion of the Uruguay Round negotiations in 1994 in Marrakesh. Several such decisions are contained in the legal texts that were adopted at Marrakesh but do not appear to form an integral part of WTO Agreement. The provisions stipulated therein are not subjected to the WTO's integrated dispute settlement mechanism. The Ministerial Decisions appear to be statements of "goodwill" but without any real legally binding obligations upon members. In fact Ministerial decisions have not in most cases been fully implemented in letter and in spirit, owing to a large extent to their mostly "best endeavour" provisions and lacking any operational and practical actions. This legal and practical weakness of ministerial decisions contracts sharply with an agreement or protocol (discussed below).

Another option consists in developed countries granting duty-free and quota-free treatment products originating within LDCs within their existing unilateral preferential schemes in particular the GSP. Developed countries for obvious reasons prefer this option,

¹¹ The African Ministerial Conference recommended to the Third WTO Ministerial Conference that "A Decision is required to institute a system of tariff bindings at zero rates by developed countries, for products originating in Least Developed Countries (LDCs), 33 of which are in Africa..."

and the Quad proposal indeed upholds this option. This option is most practical as no extensive negotiations is needed to implement the proposed duty-free and quota-free market access for LDCs. It also has a merit of needing no additional legal coverage so as to be WTO compatible as existing preferential schemes are already covered by the Enabling Clause. The problem with the option though is that the granting of the market access preferences would depend entirely on the good will of the preference-granting countries. The preference could at any time be withdrawn when and if the preference-giving country judged it necessary. Also, there is no legal obligation for developed countries to extend the duty-free and quota-free market access to "all" products from LDCs and the determination of the "essentially all" products would reside solely with the preference-giving country. Accordingly, such a unilateral scheme remains unstable and may not provide commercially meaningful benefits for a sufficiently long period that could be exploited effectively by LDCs and their export-oriented enterprises.

In order to address the inherent deficiencies in the unilateral preferential arrangements, further political and legal impetus would be needed in the form of a joint action by the entire WTO Membership, namely a Ministerial Decision, which would commit developed members to grant duty- and quota-free market access for LDC imports under their respective preferential schemes. In so doing, provisions proposed in the draft protocol (section III) can *mutatis mutandis* be utilized as a prototype of such a decision. With a view to ensuring that extended preferences given to LDCs are legally binding and stable as well as commercially meaningful, a particular consideration should be given to "binding" of the LDC preferences. However, ways and means are yet to be found to realize such binding under current provisions of GATT 1994 as "binding" in the sense of listing of bound tariff rates in country Schedule of Concessions is irrelevant in the context of enhancing "preferential" LDC market access conditions.

Yet another option would be to conclude a plurilateral agreement within the WTO, only among interested parties (like-minded countries), in line with Agreement on Government Procurement. The resulting agreement would be not necessarily subject to the single undertaking and may or may not be subject to the WTO Dispute Settlement Mechanism. It is different from an agreement in the sense that its legal rights and obligations only applies to those

members that are signatories to the agreement, without prejudice to non-participants. This option could merit consideration if the proposed Protocol (below) encounters opposition from non-LDC developing countries, and if it is unable to secure full and effective compliance by all WTO Members. The selective membership of the Agreement would enable tailor-made provisions to be incorporated so as to be acceptable to participating countries, thus the resulting agreement may be easily accepted by the signatories and effective implementation is ensured. It would be important to ensure for this option to have meaningful results that there is participation by all developed countries and as many developing countries as possible. A problem may arise however in the negotiations in terms of overall consistency of the plurilateral agreement with WTO Agreements and it may be challenged by non-participating countries. In addition, issues pertaining to imbalance in negotiations between stronger developed countries and weaker LDCs apply.

A further option is for negotiations to be undertaken between developed countries (individually or jointly) on the one hand and LDCs on the other with a view to concluding a stand-alone agreement outside the WTO on increased market access conditions for LDCs. Such a contractual agreement is provided in the trade provisions of the Fourth Lomé Convention and its successor the Cotonou Partnership Agreement between the ACP Group and the EU. Again, the agreement could include provisions similar to the proposed Protocol discussed below. A merit of this option is that, as opposed to an agreement within WTO, it would enable all LDCs including non-members of WTO to participate in negotiations and benefit from duty-free, quota-free treatment for their products. In addition, as with the proposed Protocol, the commitment by developed countries would be rendered legally binding to the extent that they agree on the resulting agreement and ratify it within their respectively national legislative organs. This agreement would subsequently need a WTO legal coverage, most likely a GATT waiver as opposed to the case of the proposed Protocol. Alternatively, the parties involved in the agreement could invoke the Enabling Clause, but they would need to convince and receive approval from the WTO membership of this option.

A problem with this option is that it entails extensive negotiations among parties, thus the outcome is likely to be influenced

considerably by the distribution of bargaining power among participants in negotiations, and in this case in favour of the developed countries. The developed countries could succeed in avoiding legally binding commitments and in excluding many of the important export products of LDCs from the duty-free and quota-free treatment. In this context additional international support and institutional framework could be provided so that the LDCs' interests in the trade negotiations could be effectively promoted. For instance, UNCTAD could be used as the negotiating forum for the market access negotiations for LDCs, as UNCTAD enjoys universal membership, comprising all LDCs, which is not the case with the WTO. UNCTAD also acts as the UN body having overall supervisory role over the UN's support for the development of LDCs. This option appears particularly preferable in that the Third United Nations Conference on LDCs, scheduled to take place in May 2001 in Brussels, may be seen as an occasion for the countries concerned to launch this process of negotiations for a contractual and thus binding agreement on enhanced market access conditions for LDCs. In fact, an agreement on such negotiations could be perceived as a concrete result of the conference.

A Draft Protocol to GATT 1991

THE provisions of the proposed Protocol to GATT 1994 on enhanced market access conditions for LDCs are provided in the box below. It proposes in operational terms a legally binding ready-made, i.e., a model legislative texts/draft for consideration by interested countries so that eventually the substantive provisions could be transposed into an appropriate WTO legal instrument. The key issues underpinning the design of the Protocol are discussed in Section IV.

**DRAFT [PROTOCOL] TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE
1994 ON ENHANCED MARKET ACCESS IN FAVOUR OF LEAST DEVELOPED
COUNTRIES¹³**

[WTO Members,]

[*Having* regard to:

- The GATT Contracting Parties Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, wherein provision is made for according special treatment to LDCs;
- Part IV of GATT 1994 providing more favourable conditions of access to world markets for products exported by developing countries;
- Paragraph 5 of the Marrakesh Declaration of 15 April 1994 wherein Ministers declared their intention to continue to assist and facilitate the expansion of LDCs' trade and investment opportunities;
- Preamble of Marrakesh Agreement Establishing the World Trade Organization wherein the Parties recognised the need for positive efforts to ensure that developing countries, in particular LDCs, secure a share in the growth in international trade commensurate with the needs of their economic development;
- Preamble as well as Paragraph 2 of Decisions on Measures in Favour of Least Developed Countries wherein Ministers declared their intention to adopt positive measures to facilitate the expansion of trading opportunities of LDCs;
- The Ministerial Declaration adopted on 13 December 1996, Singapore, in particular its Paragraph 14 (the Integrated and Comprehensive Plan of Action for LDCs), wherein Ministers

¹³ Bold texts in square brackets indicate alternative to the proposed texts.

announced their commitment to address the problem of marginalisation of LDCs and their agreement and its follow-up by the High-Level Meeting on Integrated Initiatives for LDC's Trade Development in 1997;

- The Ministerial Declaration adopted on 20 May 1998, in particular its paragraph 6 wherein Ministers expressed their deep concern over the marginalisation of LDCs and committed themselves to continue to improve market access conditions for products exported by LDCs on as broad and liberal basis as possible;

Recognising specific and urgent needs of least developed countries for sustainable economic and social development and poverty alleviation though full participation in the multilateral trading system,]

Hereby *agree* as follows:

DEVELOPED MEMBERS

Article 1: Duty-free treatment

1. Products originating in **LDCs [LDC Members]**¹⁴ shall be imported into developed Members free of customs duties and charges having equivalent effect.

2. All existing customs duties or charges having equivalent effect imposed by developed Members on products originating in LDCs shall be eliminated immediately after the entry into force of this Protocol.

Article 2: Quota-free treatment

1. Developed Members shall not apply to imports of products originating in **LDCs [LDC Members]** any quantitative restrictions

¹⁴ The distinction should be made between "LDCs" and "LDC Members of the WTO". If a Protocol is to be agreed within the WTO and attached to GATT 1994, it follows that the Protocol may only be applicable to LDCs that are Members of WTO.

or measures having equivalent effect immediately from the entry into force of this protocol.

2. All existing quantitative restrictions or measures having equivalent effect being applied by developed Members on products originating in LDCs shall be eliminated immediately after the entry into force of this Protocol.

Article 3: Temporary exemption

1. Notwithstanding provisions in Articles 1 and 2, developed Members may temporarily exempt certain products from their obligations under Articles 1 and 2, provided that a list of exempted products is annexed to this Protocol (hereinafter referred to as “gradual liberalisation list”).

2. Customs duties and equivalent charges, as well as quantitative restrictions and equivalent measures imposed on those products listed in the gradual liberalisation list shall be removed completely no later than **[three years]** from the entry into force of this Protocol.

3. Developed Members shall notify within **[three months]** following the entry into force of the Protocol the detailed plan for the elimination of customs duties and equivalent charges, as well as quantitative restriction imposed on the listed products to **[the Committee on Trade and Development (the Committee)]** which shall keep under regular review the situation of implementation of the plan by each developed country Member. Consultation shall be held at the request of a **LDC [LDC Member]** with regard to the selection of listed products as well as the plan for their elimination.

4. **[The Committee]** shall take any appropriate action as deemed necessary within its competence with a view to ensuring the effective implementation of the plan by the developed Member.]

DEVELOPING MEMBERS **[and Members whose economy is in transition]**

Article 4

1. **[Advanced]** Developing Members **[and Members whose economy is in transition]** shall, to the maximum extent possible, **[extend to [all] imports from LDCs, tariff-free and quota-free treatment consistent with domestic requirements and international agreements,]** or provide preferential treatment for essentially all products originating in LDCs, consistent with the Decision on Waiver on Preferential Treatment for Least Developed Countries (WT/L/304, 17 June 1999) on a generalised, non-reciprocal basis without being required to extend the same treatment to like products of other Members.

2. Consultation shall be undertaken when **an LDC [LDC Member]** requests the inclusion of certain products of its export interest in the list of eligible products for the duty and quota-free treatment by the developing Members. The developing Members shall accord a sympathetic consideration to such a request.

GENERAL PROVISIONS

Article 5: Nullification or impairment

1. Developed members shall not **[Members shall endeavour not to]** introduce new, or expand existing, trade-related measures such as production and export subsidies, and incentives which have the effect of affecting the interests of one or more **LDCs [LDC Members]** under this Protocol by restricting the exports of LDCs or nullifying or impairing benefits reasonably expected to accrue to the **LDCs [LDC Members]** consequent to the implementation by developed Members of Articles 1 and 2.]

[2. Where developed Members intend to take any trade measures affecting the interests of one or more LDCs [LDC Members] under this Protocol, they shall inform the [Committee on Trade and Development].

[3. Consultations shall take place, where the Members concerned so request, in order to take account of their respective interests.]

Article 6: Third party

1. Members shall not take **[refrain from]** any action and measures, or shall not request other Members to take action and measures, that may hamper the effective and timely achievement of the objectives of the Protocol as stipulated in Articles 1 and 2. **[In particular it is understood that Members shall refrain from requesting a developed, developing and transition economy Member for any compensation consequent to that Member's elimination of existing custom duties and equivalent charges or quantitative restrictions and equivalent measures on products originating LDCs pursuant to Articles 1, 2 and 4.]**

2. Consultation shall be undertaken at the request of a Member when the latter finds that its export interest in the other developed Member's market has been affected to such an extent as to cause, or threaten to cause, serious injury to its export industries as a consequence to the developed Member's elimination of customs duties or equivalent charges or quantitative restriction or equivalent measures imposed on products originating in LDCs. Members concerned shall endeavour to reach satisfactory solution to the problem while taking maximum account of export interests of LDCs.

Article 7: Safeguards

1. Where any product from an LDC is being imported into the developed or developing Members in such increased quantities and under such conditions as to cause or threaten to cause serious injury to its domestic producers of like or directly competitive products or serious disturbances in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region, the Members concerned may take appropriate measures under the conditions and in accordance with the procedures laid down in Article XIX of GATT 1994 and the Agreement on Safeguards.

2. Prior consultation shall take place concerning the application of the safeguard clause, both when such measures are first proposed, adopted and when they are extended. The developed and developing Members shall provide the LDCs with all the information required for such consultations and shall provide the data from which to determine to what extent imports from an LDC of a specific product have caused the effects referred to in paragraph 1.

3. When applied, safeguard measures shall take into account the existing level of the LDC exports and developed and developing Members shall accord special consideration to their potential for development.

4. Members undertake to hold regular consultations with a view to finding satisfactory solutions to problems which might result from the application of the safeguard clause.]

5. **[The Committee on Trade and Development]** shall, at the request of any Members concerned, consider the economic and social effects of the application of the safeguard clause.]

Article 8: Other trade remedies

1. Developed Members shall not apply **[Members shall endeavour not to apply]** any contingency measures including anti-dumping and countervailing measures to the products originating in LDCs **[until such a time that all other reasonable courses of action have been exhausted]**.

[2. Prior consultation shall take place concerning the application of contingency measure. The developed and developing Members shall provide the LDCs with all the information required for such consultations.

3. The application of those contingency measures must fully comply with the provisions of Agreement on Implementation of Article IV of GATT1994 as well as Agreement on Subsidies and Countervailing Measures.

4. **When applied, these contingency measures shall take into account the existing level of the LDC exports. Developed and developing Members shall accord special consideration to their potential for development.]**

Article 9: Rules of origin

1. The concept of ‘originating products’ for the purposes of implementing this Protocol, and the methods of administrative co-operation relating thereto, are defined **[in the protocol annexed hereto]**.

2. Where the concept of ‘originating products’ has not yet been defined for a given product pursuant to paragraphs 1, Members shall apply those definitions as contained in article 1 of Agreement on Rules of Origin.

3. Any rules of origin applied for the purpose of this Protocol shall be tailored to promote the LDCs’ participation in global production chains and the marketing of the products. Those rules shall be simplified and harmonized.

Article 10: Consultation

1. In order to ensure the effective implementation of this Protocol, and in addition to the cases for which consultations are specifically provided for in **Articles 2 to 8**, Members shall inform and consult each other in the **[Committee on Trade and Development]**.

2. Such consultations must be completed within **[three months]**.

Article 11: Dispute settlement

The Protocol shall form an integral part of the GATT 1994. **[It is thereby understood that Annex 2 to the Marrakesh Agreement Establishing World Trade Organization (“Understanding on Rules and Procedures Governing the Settlement of Disputes”) is applicable to the provisions of this Protocol.]**

Article 12: Annual review

The implementation and operation of the Protocol shall be kept under the periodical review in the **Committee on Trade and Development**. In this regard, an annual report shall be presented by the WTO Secretariat, in collaboration with the UNCTAD Secretariat, at the last session in the year of the **Committee on Trade and Development**.

Article 13: Definition

For the purpose of this Protocol:

(a) “Developed Members” are those Members [**that are members of the Development Assistance Committee of the Organization for Economic Co-operation and Development**]; [**that have been offering unilateral trade preferences under GSP to developing countries**]; [**that are recognised as such in the WTO Agreements**].

(b) “LDCs” are those countries and territories that have been so designated by United Nations. LDC Members presently are: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of Congo, Djibouti, The Gambia, Guinea Bissau, Guinea, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Sierra Leone, Solomon Islands, the United Republic of Tanzania, Togo, Uganda and Zambia.

(c) “Developing Members” are those Members [**other than developed Members and LDCs (LDC Members)**] [**Developing Members other than LDCs (LDC Members) and Members whose economy is in transition from the centrally planned to the market-oriented economy**]

Article 14: Entry into force

[1. This Protocol shall be open for acceptance, by signature or otherwise, by Members until [31 December 2001].

2. This Protocol shall enter into force on the thirtieth day after **[31 July 2001]** for those Members which have accepted it by that date, and for those accepting it after that date, it shall enter into force on the thirtieth day following the date of each acceptance.

Done at **[PLACE]** this **[—-th day of MONTH]**, **[YEAR]**, in a single copy, in the English, French and Spanish languages, each text being authentic.

Issues on the Design of the Protocol

THE objective of the proposed Protocol to General Agreement on Tariffs and Trade (GATT) 1994 on enhanced market access condition is to ensure that duty-free, quota-free treatment for ALL products originating in by LDCs is provided by as wide a range of countries as possible, including developing countries. The proposed Protocol seeks to achieve this objective in two ways namely, through the combination of legally binding commitment by developed WTO Members and by best-endeavour commitment by other non-LDC advanced developing WTO members and WTO Members with economies in transition.

Accordingly, the Protocol prohibits the imposition of both tariff and quantitative restrictions on LDC exports by developed Members as a way of ensuring duty-free and quota-free treatment for LDC products, immediately after the entry into force of the Protocol. The entry into operation of the protocol, allowing for endorsement by WTO Members and national approval processes, could feasibly be January 2002. The time frame for the operationalization of the Protocol is an equally important consideration. An expeditious conclusion of negotiations and entry into force of the Protocol can provide a significant boost in the direction of the integrating development dimensions into the multilateral trading system. The provisions of the Protocol should be legally binding, as the Protocol would form an integral part of the GATT 1994, which would

also mean that the same provisions would be actionable under the WTO's DSM.¹⁵

Advanced developing WTO Members are also invited to the extent possible to grant LDCs, duty-free and quota-free market access for as wide a range of products as possible unilaterally, on a non-binding basis as provided for by the GATT waiver on the south-south preference. The waiver is provided in the Decision on Waiver on Preferential Treatment for Least Developed Countries, adopted by the WTO General Countries on 17 June 1999. It was necessitated by the lack of consensus among WTO members on the suitability of the Enabling Clause for trade preferences provided by developing countries to LDCs in the light of the decisions of the 1997 High-Level Meeting on Least Developed Countries.

In order to address the concerns over product coverage and thereby facilitate acceptance by developed WTO Members, the Protocol offers some derogation, which is nonetheless time-bound, from the principle of the duty-free and quota-free treatment for all LDC imports. Firstly, developed Members could exempt temporarily certain "sensitive" products from the total immediate liberalization by positively listing them on a "gradual liberalization list". The listed products however would be subject to liberalization within a determined period of time, say, three years. The Protocol thereby seeks to eventually provide duty-free and quota-free access for ALL products exported by LDCs, while during an interim period offer developed Members the possibility of gradual liberalization of products considered sensitive.

The proposed Protocol thus provides for increased market access for LDCs by statutorily prohibiting the imposition of tariffs and quantitative restrictions on LDC imports by developed WTO

¹⁵ It should be recognized that LDCs remains extremely weak in the face of powerful developed countries even though the DSM is applicable to their market access conditions. Given their small market size, LDCs could not meaningfully bargain with developed countries and retaliate against their eventual violation of their commitments (i.e. suspension of concessions). However, the point in making LDC market access conditions actionable under DSM is to raise the stakes high for developed countries in that it is not only the economic interests, but also the country's reputation as well as the credibility of DSM, and hence the multilateral trading system would be placed at risk in such a case of non-compliance by developed countries with their legal commitments. Developed countries would thus be placed under greater pressure to abide by their commitments, irrespective of the market size of LDCs.

Members (Articles 1 and 2) and to the extent possible by developing Members and members with economies in transition (Article 4). The Protocol is legally binding in the sense that it supplements GATT 1994 and thus forms an integral part of the WTO Agreement. Hence, the DSM is applicable to its provisions and reinforced by the Protocol (Article 11). The Protocol addresses the concern of both LDCs and developed WTO Members on the coverage of products by suggesting (Article 3) a two stage process involving firstly “essentially all” products and thus allowing for some exceptions; and secondly, the integration of the remaining products in the exception lists into the liberalization lists after a short time period.

The products benefiting from the preferential treatment would be subjected to rules of origins (Article 9) which would have to be developed, but which in any event have to be simple and liberal enough to enable LDC exporters to effectively draw maximum benefits from preferences accorded to them in terms of enhanced market access conditions. The issue needs particular attention as rules of origin and product standards have often impeded developing countries, LDCs in particular, from drawing maximum benefits from the existing unilateral preferential schemes. Additionally, a provision (Article 7) is provided to preference providers for the application of safeguard measures albeit to the extent and in a manner that is consistent with the WTO Agreement on Safeguard. However, other trade remedies such as anti-dumping and countervailing measures are prohibited (Article 8) for developed WTO Members and highly discouraged for all Members as general rule.

Furthermore, provision is made in the Protocol (Articles 10 and 12) to ensure that the WTO Membership regularly monitors and assesses the implementation and impact of the Protocol on LDCs. This review would provide an avenue for the WTO membership on a regular basis to evaluate progress achieved and address bottlenecks that might arise.

The effective implementation of the duty-free and quota-free treatment for LDCs by developed and other developing countries is further ensured by the Protocol in two ways. Firstly, the Protocol obliges (Article 6) a commitment by all other WTO Members (those not providing the preferences) not to take measures or actions that may hamper the achievement of the objective, in the form of compensation request so as to nullify benefits expected to accrue to LDCs as a consequent to the elimination of barriers to trade by

developed Members, advanced developing members and transition economy members. Secondly, the Protocol obliges (Article 5) preference offering developed Members not to take any action or measures that would nullify benefits expected to accrue LDCs when all tariff and quantitative barriers to trade on their exports are eliminated by those countries.

There are at least three other general issues that need to be considered with regard to the proposed Protocol. The first is that the Protocol would necessitate WTO Members, almost by definition, to engage in negotiations. In international law, States are bound by a trade agreement only if they consent on being bound by such an agreement and having ratified it. This is all the more case if the trade agreement is to assume any legally binding, contractual nature. The option of agreeing on a Protocol thus could entail a series of extensive and maybe difficult negotiations within the WTO. The negotiations that may be required in agreeing on the Protocol may not be linked to the launching of a broader round of multilateral trade negotiations. It has been the position of the LDCs themselves and the current Director-General of the WTO (Mr. Mike Moore) that LDCs' market access concessions should never be seen as a leverage for negotiations in the context of a possible launching of a new round of multilateral trade negotiations.

Secondly, the scope of country coverage of the Protocol needs special attention. A distinction will be made between "LDCs" and "LDC Members of the WTO". If a Protocol is to be agreed within the WTO and attached to GATT 1994, it follows that the Protocol would only apply to LDCs that are Members of WTO, which may go against the spirit of LDC market access initiative being for all LDCs as defined by the United Nations General Assembly. It may therefore be the case that a simple extension of unilateral preferential trade treatment under GSP schemes or a stand-alone agreement between developed countries and other preference-giving countries on the one hand and LDCs on the other, as a whole may well prove to be better suited in this regard for the purpose of extending duty-free and quota-free treatment for all 48 LDCs.

Thirdly, it should be noted that the point of agreeing on the Protocol by all WTO Members in its entirety, as distinct from a stand-alone agreement that may be concluded outside the WTO or unilateral preferential arrangements, is that such a Protocol/Agreement would form by itself a legal foundation equivalent to, for instance,

the GATT Contracting Parties Decision of 28 November 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause). In theory, to the extent that all the Members of the WTO, acting jointly, formally agree on the preferential treatment for LDC products, the Protocol should need no additional legal foundation in order to be WTO compatible, provided that such a Protocol supplements the provisions and purposes of GATT 1994. It also becomes binding on all WTO Members.

Practically however, it is extremely difficult for WTO Members to agree on a legal instrument under the WTO on preferential market access as proposed in the Protocol that would challenge the fundamental principle of the multilateral trading system, namely the MFN clause.¹⁶ This difficulty in ensuring legal consistency explains in part why many special and differential provisions within WTO agreements in favour of developing and least developed countries have been of best-endeavor nature. It also explains why trade preferences have traditionally been provided under unilateral preferential schemes of individual preference-giving countries that are in themselves a derogation from the MFN principle, and thus have necessitated the invocation of legal coverage under GATT/WTO provisions in respect of the Enabling Clause or a waiver. A legal arrangement other than in the form of a "protocol" may prove to be necessary in this regard. Ultimately, the WTO Members need to be innovative and at the same time willing to design new disciplines to address effectively and practically the concerns of LDCs over their continued marginalization in the multilateral trading system and the Protocol is proposed in this direction.

Conclusion

THE option of the proposed Protocol to GATT 1994 on enhanced market access conditions for LDCs is desirable for LDCs in that it would form by itself legally binding obligations for devel-

¹⁶ It can be recalled that a protocol must be in accordance with principles and provisions of the parent treaty. In cases of conflict, provisions in the parent treaty prevail over those in the protocol.

oped, advanced developing and transition economy WTO Members to provide with duty-free and quota-free market access for all LDC products. But its practical feasibility, onerous negotiations involved and the limited coverage of LDCs pose major questions that need to be addressed. Thus, other options to the Protocol, as a second best avenues, should not be ignored. Particular consideration should be given to utilizing the Third United Nations Conference on LDCs in May 2001 to seek international endorsement of practical modalities such as the proposed Protocol or other options for better market access conditions for LDCs.

Alternatives to the proposed Protocol (Agreement) are several. These include the following: (a) granting of duty-free and quota-free treatment to products originating within LDCs within existing unilateral preferential schemes such as the GSP and to this end a WTO Ministerial Decision can be utilized to operationalize this option; (b) conclusion between developed countries (individually or jointly) on the one hand and LDCs on the other of a stand-alone agreement outside the WTO on increased market access conditions for LDCs, which would then be transmitted to the WTO for endorsement invoking either the waiver or Enabling Clause; and (c) conclusion of a plurilateral-type agreement within the WTO between as many interested developed countries, transition economies and developing countries on the one hand and LDCs on the other.

In addition to the legal framework, the real value of the market access conditions for LDCs should be analyzed in detail, studying such issues as the product coverage, rules of origin and other non-tariff barriers especially the often stringent sanitary and phytosanitary measures applied in developed countries. This work could be undertaken by international organizations such as UNCTAD and the World Bank.

Finally, it must be noted in discussing market access conditions for LDCs that while such issues are important and they assume primacy in a trade organization such as the WTO, they are secondary to issues for building up supply capacities, institutional and human capabilities, and physical (transport, telecommunications) infrastructure and networks. The latter are critically for LDCs to operate competitively in a multilateral trading environment characterized by liberalization. Thus, the support to be provided to LDCs by the WTO Membership and the international community must emphasize a balanced and integrated approach for their integration into

the multilateral trading system. Such an approach would encompass as integrated, inter-connected and indispensable elements for LDCs, the improvement of market access conditions, greater supply capacities of export sectors including technological development to take advantage of the market access opportunities, more effective human and institutional capabilities to manage and negotiate effectively commercial agreements and better infrastructural facilities to move goods and services at cost efficient rates.

To this end, UNCTAD, the World Bank and other international organization should continue to provide to LDCs with increased technical assistance and capacity building activities. These activities should be directed at the development in LDCs of a new policy environment, a new and strengthened institutional environment, a new and strengthened human resource environment and a new and strengthened physical infrastructure network dedicated to addressing and integrating LDCs into the multilateral trading system.

The Banana War: Whose Market Access?

AMELIA PORGES

Powell, Goldstein, Frazer & Murphy LLP

Introduction and Background

ON April 10, 2001, EU Commissioner Pascal Lamy and USTR Robert Zoellick announced that they had finally reached agreement on a settlement to the “banana war.”¹ Later in April, the EU Commission came to terms with Ecuador, the largest banana exporting country.² Through these two agreements, the EU settled on a revised EU banana import system with the objective to resolve the long-standing banana dispute and make it possible to eliminate WTO-authorized trade sanctions against EU exports.

¹ “U.S., EU remove significant trade irritant by striking banana deal,” *Inside U.S. Trade* update April 11, 2001, with statements in support from Sen. Grassley and Chiquita Brands International, and statement in opposition from Dole Foods Co. *See also* Commission documents “U.S. Government and European Commission reach agreement to resolve long-standing banana dispute,” press release IP/01/562, statement from Cmr. Pascal Lamy, release IP/01/559 and note on “The banana case: Background and history,” MEMO/01/135, all dated April 11, 2001, available from RAPID database at <http://europa.eu.int/rapid/start/welcome.htm>.

² “EU and EUuador reach agreement to resolve WTO banana dispute,” release IP/01/627 of April 301, 2001 available from RAPID database; “Commission Approves Banana Regs After Settling With EUuador,” *Inside U.S. Trade*, May 4, 2001; text of EU-Ecuador agreement and EUuador announcement available on *Inside U.S. Trade* website.

The banana settlement provides for a transition regime until the beginning of 2006, when the EU will change to a tariff-only import regime for bananas. During the transition period, the EU will maintain three tariff-rate quotas (TRQs) for bananas. TRQs A and B, totaling 2,553,000 tonnes, will be managed as one with import licenses allocated to operators according to historical market share in the 1994-96 period.³ A third TRQ C will be set initially at 850,000 tonnes, and it will be reserved for bananas from the African/Caribbean/Pacific (ACP) countries of the Lomé Convention as soon as the WTO agrees to a waiver that would make such a reservation WTO-consistent. After the settlement was reached with Ecuador, the Commission on May 2 adopted rules instituting the new banana import regime effective July 1, 2001.⁴

For years, the banana issue had gratified those taking a pessimistic view of international cooperation in the WTO and in the European Union. It seemed that the EU banana regime could never satisfy all parties, that no solution would make all parties better off, and that all foreseeable solutions would make at least one important actor fundamentally unhappy. The road to compliance with the WTO Agreement remained blocked by severe obstacles, created by the administration of the present EU banana regime and ultimately by the country-specific colonial banana regimes that the EU regime replaced. The EU-U.S. agreement of April 2001 testified to the inventiveness and determination of Lamy, Zoellick and their negotiators in overcoming these obstacles.

The particular difficulties presented by the banana case were avoidable, and could have been predicted. Before 1993, European member state banana import regimes largely consisted of import quotas favoring present and former colonial areas at the expense of other trade, even from other EU member states. To eliminate these barriers to intra-EU trade, the EU instituted a single banana regime in 1993, but it chose to use as its trade policy instrument a series of tariff rate quotas. The tariff rate quotas generated increased rent - and increased discord concerning TRQ allocation. But this should

³ Details discussed below.

⁴ "Commission implements regulation to bring WTO banana dispute to an end," release IP/01/628 dated May 2, 2001, available on RAPID database.

not have been a surprise. As long ago as 1951, Harry Hawkins' classic *Commercial Treaties & Agreements: Principles & Practice*⁵ noted the inherent unfairness of quota allocation compared to an equal tariff applied to all sources.

"A tariff rate applied equally to all supplying countries will not ordinarily disturb their competitive relationship with one another. A change in the productive efficiency of one country means that it will supply a larger or smaller share of the market. In the matter of quantitative restrictions, however, it is technically very difficult, if not wholly impossible, to give all suppliers equitable treatment. Even if something approaching equity is provided at the time country quotas are established, the relative competitive positions of supplying countries tend to be frozen. Improvements in productive capacity are unavailing, since they have no effect on the distribution of shares in the market concerned. Where there is not the will to play fairly, and unfortunately this is too often the situation, quantitative restrictions provide an easy means of discrimination. Licensing systems, whether used in conjunction with quotas or not, give wide scope for favoritism. Even if the legislators concerned intend in good faith to deal fairly, favoritism by administrative authorities is easy."⁶

The trade policy instrument behind the banana of discord - the tariff rate quota, or TRQ - is now in wide use among Members of the WTO, because of its use in tariffication of agricultural market access barriers during the Uruguay Round. The banana case presents a cautionary example for Bank policymakers – demonstrating the potential of TRQs as agents of divisiveness between suppliers, and within the developing world.

Quotas, Tariff Quotas and the GATT Rules of Equitable Distribution: a Primer

The banana case involved the WTO market access rules governing both trade in goods (principally the GATT) and services (the General Agreement on Trade in Services, or GATS). Each embodies

⁵Rinehart, 1951; Hawkins was the chief of the U.S. State Department's Trade Agreements Division, a negotiator of many reciprocal trade agreements and one of the fathers of the GATT.

⁶*Id.*, p. 162-163.

basic principles of non-discriminatory market access; the crux of the banana problem has been the conflict between the EU banana regime and these non-discrimination principles.

Article I:1 of the GATT requires that each WTO Member provide most-favored-nation treatment with regard to the tariff levied on imports of products. This requirement applies in conjunction with Article XIII, the non-discrimination clause requiring equitable allocation of quantitative restrictions. Article XIII applies both to import and export quotas and to tariff rate quotas. A tariff rate quota has three components: a limit (quota) on the maximum volume of imports that may enter at the in-quota tariff; an in-quota tariff; and an over-quota tariff. The tariff rates must be consistent with the tariff concessions in that Member's WTO tariff schedule, and are subject to the MFN obligation in Article I:1. The allocation of the tariff rate quota is governed by Article XIII.

Article XIII:1⁷ provides that no prohibition or restriction shall be applied by any WTO Member on the importation of the product of the territory of any other Member, unless the importation of the like product of all third countries is similarly restricted. A Member may not limit imports from some Members but not from others. It also may not restrict imports from some Members one way and from others another way. The panel and the WTO Appellate Body in the Banana case found that the non-discrimination requirements of Article XIII apply to a market for a product (i.e. bananas), irrespective of how a Member subdivides that market for administrative or other reasons;⁸ for that reason, maintaining separate tariff quotas on the same product with different degrees of restrictiveness is not consistent with Article XIII.

Article XIII:2 provides the specific rule that in applying import restrictions to any product, Members are to aim at a distribution of trade in that product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of restrictions. Members may apply quotas that are not allocated by country (for instance, first-come-first-served regimes). Where a quota is allocated among supplying countries, the importing Member may seek agreement with all "substantial suppliers"

⁷The following précis is based on the extremely lucid exposition on Article XIII in paras. 7.78-7.92 of the panel report in the Banana case, WTO document WT/DS27/USA/R.

⁸*Id.*

(customarily interpreted as Members having 10 percent or more of imports). If this method is not practicable (for instance, if the substantial suppliers will not agree), the importing Member is to allot to substantial suppliers shares based on a previous representative period, "due account being taken of any special factors which may have affected or may be affecting the trade in the product." The importing Member may use a general "others" category for suppliers below the cutoff for substantial supplier status, or may allocate shares for them, but if it allocates shares for some of them it must allocate such shares to all suppliers.⁹

As can be seen, there is only a limited range of possible GATT-consistent solutions to dividing the tariff quota pie. The importing country can do without a tariff quota, and set a tariff at a level which provides the desired level of protection. It can have an unallocated tariff quota with a first-come-first-served regime. It can have a tariff quota allocated according to a historical reference period. Yet, as Hawkins noted in 1951, it is practically impossible to please everyone. A first-come-first-served regime may give nearby suppliers an advantage, and ship races may bunch shipments early in the quota period. Picking a historical reference period for allocating import shares may make some supplying countries very happy and others very unhappy. By freezing market shares at some point in time, it will have a disproportionate impact on the most competitive suppliers who were most dynamically expanding their market shares at the time that the access limits started. Hawkins concludes that "an attempt to apply the rule of non-discrimination to quantitative restrictions with anything approaching its effectiveness as applied to tariffs is bound to fail."¹⁰ The rules reflected in this area of the GATT are only approximations which may, under the right conditions, make it possible to reach a stable equilibrium result.

Nondiscrimination obligations under the WTO Agreement also include the obligation to provide national treatment for imported goods, and for services and service suppliers of other WTO Members. Article III of the GATT, by mandating national treatment for imported products, precludes a WTO Member from using non-tariff means to reserve pieces of its market for domestic suppliers.

⁹ *Id.*

¹⁰ Hawkins, *op. cit.*, p. 172.

Article XVII of the GATS requires that where a Member has made a commitment to provide national treatment, it must accord to services and service suppliers of any other Member treatment no less favorable than that it accords to its own services and service suppliers, in respect of “all measures affecting the supply of services.” The EU made a commitment in the Uruguay Round to provide national treatment in the distribution services sector. GATS Article II also requires that each Member accord services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.

The final important concept for understanding tariff quotas is that of rent. Anyone who has the right to import goods within a tariff quota can make a risk-free profit equal to the difference between the domestic price and the duty-paid import price (i.e. the world price plus the in-quota tariff). Rents made import licenses for bananas into valuable (tradeable) pieces of paper. As of mid-1998, one report estimated the total value of licenses at nearly \$1 billion, varying between \$0.50-\$7.00 per box; in bad times, the license price could amount to more than 50% of the total import price.¹¹ As of September 1999, the EU Commission itself estimated rents at 200 ECU/ton for bananas imported into the EU. Tariff quotas also are associated with substantial cost to consumers and deadweight loss. The rents associated with the EU banana regime are notoriously huge and were a major obstacle to achieving a solution. While most actors have endorsed (at least at some time) a tariff-only solution, they have found it impossible to resist the rents that TRQs bring.

Some History

WHILE important features of the present EU banana regime only date from 1993, some fundamental aspects date back almost 50 years. As is well known, the EU regime of 1993 resulted from the EU's Single Market Initiative of the early 1990s to elimi-

¹¹A. van de Kastelee, “The banana chain: The macro EUonomics of the Banana trade,” May 1998 <http://bananas.agoranet.be/MacroEconomics.htm> sec. 5.2.

nate all barriers to intra-Community trade. The single most difficult such barriers proved to be those associated with banana trade.

Bananas had been traded for many years between metropolitan member states of the EU and their colonies or former colonies, in quota arrangements which reserved the metropolitan market for colonial or ex-colonial bananas. In France, the market was divided two thirds for national production (Guadeloupe and Martinique) and one third for imports from Cameroun, Cote d'Ivoire and Madagascar. Latin American bananas were imported only to make up any shortfall. Italy applied first an import monopoly and then an import quota for bananas, originally favoring Somalia but later exempting bananas of EU or ACP origin. Portugal had an organized market in bananas, favoring domestic bananas from Madeira. Spain reserved its entire market for bananas from the Canary Islands. UK imports of bananas were subject to a quota, for which the government allocated licenses.¹² Only Germany had a free market for bananas, with a duty-free quota for bananas sufficient to satisfy German demand; consequently German consumers consumed 14 kilos a year of bananas versus 8 kilos per year in the UK.¹³

During the negotiation of the Treaty of Rome which formed the European Economic Community, France insisted on retaining a special relationship with its overseas territories. The result was Part IV of the Treaty, which provided for association and preferences for overseas countries and territories of EEC member states.¹⁴ Part IV eventually became a basis for the Lomé Convention between the EU and the ACP countries. The preferences based on or created by Part IV gave rise to a high level of concern and protest by the developing countries excluded from those preferences, led by Latin American countries, the UK (for its colonies) and Commonwealth countries. The excluded reacted with initiatives of their own – the formation of UNCTAD, negotiation of Part IV of the GATT, the UNCTAD scheme for a *generalized* scheme of tariff preferences, and initiatives to lower the MFN tariffs on tropical products.¹⁵ The United States also brought a GATT dispute against the UK quota on

¹² "EEC - Member States' Import Regimes for Bananas," GATT 1947 panel report of 3 June 1993, DS32/R, paras. 19-39.

¹³ Brent Borrell, "Beyond EU Bananarama III: The story gets worse," June 1997, Centre for International EUonomics (<http://www.intecon.com.au>), p. 3.

¹⁴ Gardner Patterson, *Discrimination in World Trade: the Policy Issues* (1966), p. 234ff.

¹⁵ *Id.*, pp. 233-270 and chapter VII.

“dollar bananas” in 1972-73, which ended inconclusively.¹⁶ In 1993, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela brought a complaint against the member state banana import regimes, largely for the sake of getting some leverage in the debate about an EC-wide banana regime.¹⁷

The cost of the pre-1993 banana regimes was substantial. World Bank economists Brent Borrell and Maw-Cheng Yang, in their papers *EC Bananarama 1992* and *EC Bananarama 1992 - The Sequel* estimated that EU consumers paid \$576 million per year by paying preferred suppliers double the world price, \$917 million per year in extra distribution markups in the restricted markets, and \$112 million per year in tariff revenues. Net of the resources spent on growing the bananas, the suppliers only saw an estimated \$302 million per year. In other words, to deliver \$1.00 in net banana aid to 11 developing country exporters, it cost EU consumers \$5.30 of which over \$3.00 represented excessive marketing margins to EU marketers and \$1.00 was waste; along the way it cost other developing country suppliers \$0.32 (\$98 million per year) in lost export opportunities.¹⁸ Under the member state regimes some developing countries were benefited, some were discriminated against, consumers lost, and those firms with a piece of the quota trade profited greatly.

Relevant Actors, the 1993 Regulation and its Aftermath

BECAUSE maintaining differences between member state banana regimes required barriers to trade within the Community, creating a single community market meant that the member state regimes had to go. Changing banana trade rules would change market opportunities. Regulation 404/93, the output of the Single Market process, demonstrates how some actors in the marketplace were able to use the legislative process in Brussels to greatly en-

¹⁶“United Kingdom - Dollar Area Quotas,” panel reports at BISD 20S/230-237 (1973).

¹⁷ “EEC – Member States’ Import Regimes for Bananas,” panel report Jun. 3, 1993, GATT document DS32/R (unadopted).

¹⁸ Summarized in Borrell, *Beyond EU Bananarama 1993: The story gets worse*, June 1996, Centre for International EUonomics (<http://www.intecon.com.au>), p. 5-6.

hance the rents in European banana trade and capture a disproportionate share for themselves. R. H. Pedler¹⁹ provides a useful account of the lobbying leading up to the establishment of the EU banana regime, and lists the following interest groups:

- *Importers of ACP bananas:* In 1993, the three firms Geest, Fyffes and Jamaica Producers, who (in a brilliant lobbying initiative) allied themselves with the Caribbean Banana Exporters Association and its London office. These firms became the principal beneficiaries of the 1993 EU regime.
- *Growers/importers of dollar bananas:* the Dole Foods Company and Chiquita International, who were extremely active in lobbying in Brussels throughout the debate on the 1993 regime and litigated unsuccessfully against the regime within the EU.
- *Importers of dollar bananas:* are based in Germany and Benelux and had an interest in increasing the volume of dollar banana imports; they too lobbied and litigated against the banana regime in Germany and the EU.
- *Caribbean producers,* represented by the CBEA, used a public relations firm and lobbied heavily in Brussels and in London. According to Pedler, the CBEA focused on getting “cast-iron protection” for banana preferences in the 1988-90 negotiations on the Fourth Lomé Convention as leverage for the later negotiations on the single market in bananas. They obtained the Banana Protocol 5 of the Lomé Convention, which guaranteed access to the EU market for ACP states in the amount of their pre-1991 best-ever export volumes of bananas.
- *Central American producers* sought abolition of member state quotas but were late getting organized. In the period immediately before 1993, banana production was greatly expanded in Ecuador, Philippines, Costa Rica and Colombia partially in anticipation of a hoped-for opening of the EU market. In 1992,

¹⁹“The Fruit Companies and the Banana Trade Regime (BTR),” R.H. Pedler, pp. 67-91 in Pedler and Van Schendelen, *Lobbying the European Union* (Dartmouth, 1994).

Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela brought a GATT challenge to the then-prevailing member-state-specific banana regimes, to aid their leverage in Brussels; the panel found in a report submitted to the parties in May 1993 that the member state regimes were all GATT-illegal for various reasons. The ACP countries blocked adoption of this report by the GATT Council.

- *Other trading partners:* the United States and the Cairns Group were interested initially in the issues of principle. The United States remained neutral until USTR Mickey Kantor agreed to study Chiquita's case in late 1994, and eventually agreed to bring Chiquita's case to the WTO.

Commission policymaking to integrate the Community banana market took place within the framework of the Common Agricultural Policy and was based on the agricultural provisions of the Treaty of Rome. Decisions were therefore made by qualified majority vote of the member states within the council of member state agricultural ministers. The Commission initially proposed a Community-wide quota. The European Parliament introduced amendments during debate, including one which gave EU-based importers and ripeners of bananas the right to participate in the quota – widening the support base to include the German and Benelux firms in this business. The banana rules were finally settled late in 1992, during the UK Presidency of the Council of Ministers. UK Agriculture Minister John Gummer assembled a majority in December 1992 for the outlines of the regime, the final details were hammered out in February 1993, and Regulation (EC) No. 404/93 went into force on July 1, 1993.²⁰ Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela immediately brought a GATT complaint; the panel found that Regulation 404/93 was GATT-inconsistent in a report submitted to the disputing parties on January 18, 1994.²¹ The complainants except for Guatemala then negotiated a settlement in the framework of a renegotiation of the EU's tariff concession on bananas. This "Banana Framework Agreement" was inserted at the

²⁰ Pedler, op. cit.

²¹ "EEC – Import Regime for Bananas," GATT panel report (unadopted), GATT document DS38/R.

last minute into the EU tariff schedule on April 15, 1994 just before it was finalized at Marrakesh.

The trade provisions in Regulation 404/93 created two tariff quotas for bananas and four categories of suppliers. Traditional imports from ACP countries (up to their best-ever import volumes) amounted to a total of 857,000 tonnes and entered duty-free, up to a maximum fixed for each traditional supplying country. A separate tariff quota of 2 million tonnes²² applied for imports from non-traditional ACP suppliers, extra imports from traditional suppliers (such as the growing imports from Cameroun and Cote d'Ivoire) and imports from other suppliers such as Latin America. ACP bananas within this quota entered duty-free, and non-ACP bananas were subject to a tariff of 100 ECU per tonne. The over-quota tariff was 750 ECU/ton for ACP bananas and 850 ECU/ton for other bananas. The Banana Framework Agreement guaranteed specific shares of this tariff quota for imports from Colombia, Costa Rica, Nicaragua and Venezuela, and permitted transfer of quota shares between these countries.

The licensing arrangements added more layers of complication. 66.5% of licenses went to "Category A" operators who had marketed third-country or non-traditional ACP bananas – such as Dole and Chiquita. 30% went to "Category B" operators who had sold EEC or ACP bananas – such as Fyffes, Geest and Jamaica Producers – and 3.5 percent went to EEC operators who had started marketing "dollar bananas" since 1992. Giving licenses for Latin American bananas to the Category B operators was a reward for past sales of ACP bananas and provided an incentive for these firms to go on marketing ACP bananas in spite of the lower cost and higher profitability of Latin American bananas. It handed them a third of the Latin American trade by fiat. Category A and Category B operators were to receive licenses based on average quantities of bananas sold in the three most recent years; the license entitlement was further determined by an "activity function" weighting between operators who were producers and sellers of bananas, those who distributed bananas within the EEC and banana ripeners. The activity function rule was designed to buy Northern European banana

²²Increased to 2.2 million tons as of January 1, 1995 in accordance with a commitment in the EU Uruguay Round tariff schedule; also increased on an applied basis by 353,000 tons to respond to the January 1, 1995 incorporation of Austria, Finland and Sweden into an enlarged EU of 15.

importers' support for the regime, by transferring quota rents to them. After all applications for quota had been received, if the amount available for imports from a particular country was over-subscribed, each applicant would be cut back proportionately by the same "reduction coefficient" in a non-transparent process.

The Banana Framework Agreement added another wrinkle by authorizing the BFA countries to issue export certificates. If a country issued export certificates, the EU would require them to be presented by Category A and Category C operators seeking to import within the tariff quota. This made it possible for the issuing countries (Colombia, Costa Rica, Nicaragua) to capture part of the quota rent by charging for the export license; exemption from the export license requirement was another favor granted to Category B operators. To the extent that the banana tariff quota was allocated between countries, each country with a dedicated share was strengthened in bargaining with the banana trading companies. If the overall tariff quota was restrictive enough, and an exporting country wished to raise its official export price or impose an export tax in order to capture rents, the banana trading company could not counter by simply shifting its purchases to another exporting country.

Overall, the regime of Regulation 404/93 both increased the level of rents substantially, and transferred rents from the dollar banana exporters and Latin producer countries to the Category B operators and banana distribution and ripener firms within the EU. Borrell (1996) estimates the cost to consumers of the new regime at \$2.0 billion to transfer \$151 million per year to preferred banana suppliers, or a cost of \$13.25 to consumers to transfer each \$1.00 in banana aid. Rents went up enormously, with a smaller share of the rents being passed back to preferred suppliers in the form of increased producer prices; the cost to Latin American suppliers due to lower prices increased to \$147 million per year.²³

As of 1998, Dole Foods, Chiquita Brands International and Fresh Del Monte together controlled 65-70% of world imports, the Ecuadorian company Noboa accounted for another 13% and Fyffes controlled 6-7%. Dole and Chiquita had made large investments in plantations in Central America and in trading infrastructure, expecting that the Single Market process would open the European market and that Eastern European trade would develop rapidly. The

²³ Borrell (1996), p. 22.

companies had to then reduce or restructure this capacity due to Regulation 404/93.

During the 1994-98 period, Ecuador aggressively expanded its exports worldwide, led by Noboa. Fyffes used its extra European import licenses to expand in Central America and Ecuador, with uneven success. Geest attempted to compete in Central America, but sold off its banana activities in 1995 to Fyffes and to the Windward Islands Banana Development and Export Company, a joint venture between the governments of Dominica, St. Lucia, Grenada and St. Vincent and the Grenadines and the official Banana Growers Association. Dole actively invested in the ACP area, investing in the Ivory Coast and Cameroon through its joint venture with Compagnie Fruitière; Dole has also been able to use Compagnie Fruitière's distribution networks in France in Spain. Acquiring 35% of Jamaica Producers in 1994 gave Dole access to 20% of the UK market. Dole also acquired Spain's largest fruit and vegetable firm, Pascual Hermanos in 1996. Through such means, Dole substantially expanded its banana sales in Europe. Fresh Del Monte went through a change in ownership and is now owned by Grupo IAT, owned by the Abu-Ghazaleh family, with administrative headquarters in the UAE. Del Monte, Fyffes and to a lesser extent Chiquita have steadily reduced their dependence on banana marketing by diversifying into other fruits and vegetables. Dole now owns the leading exporter of fruit from Chile.²⁴

Bananas III in the WTO and its Aftermath

WHEN the WTO Agreement entered into force in 1995, Guatemala, Honduras, Mexico and the United States brought a complaint against Regulation 404/93 as amended. Joined by Ecuador after its WTO accession, the "G-5" brought another complaint in February 1996 under both the GATT and the new General Agreement on Trade in Services. A panel was established in May 1996 and circulated four panel reports on May 22, 1997. The EC appealed the panel report on June 11, 1997, the WTO Appellate Body

²⁴ Industry information in this and the preceding paragraph based on van de Kastelee, *op. cit.*

circulated its report on September 7, 1997, and the reports were adopted on September 25, 1998. After negotiations to determine the period of time for the Community to comply broke down, the matter went to arbitration; the arbitrator set a compliance deadline of January 1, 1999, or just over fifteen months from the date of adoption.

The panel and Appellate Body found that the dual tariff quota regime was not permissible under Article XIII. The EU had also erred by allocating specific tariff quota shares to some under-10% suppliers (under the Framework Agreement) and not the others in that size category; the BFA provisions allowing reallocation of quota rights also discriminated in violation of Article XIII.

In 1994, the EU had been granted a GATT waiver of Article I:1 for measures "required by" the Lomé Convention, and so the panel and Appellate Body had to rule on what the Convention in fact required. They concluded that the Convention required the EU to provide duty-free access for traditional ACP bananas and for 90,000 tonnes of non-traditional ACP bananas, to provide a margin of tariff preference of 100 ECU/tonne for all other non-traditional ACP bananas, and to allocate tariff quota shares to the traditional ACP States in the amount of their pre-1991 best-ever export volumes. The separate tariff quotas maintained for Lomé and dollar/non-traditional ACP bananas were inconsistent with Article XIII. The Appellate Body found that the violations of Article XIII were not sheltered by the Lomé waiver, because the Lomé waiver only covered violations of Article I:1. The activity function rules and the BFA export certificate requirement violated Article I:1, but were determined not to be required by the Lomé Convention and thus not sheltered by the waiver.

In addition, the licensing procedures constituted *de facto* discrimination against service suppliers originating in the complaining parties compared with service suppliers of EU or ACP origin, in violation of Articles II:1 and XVII of the GATS. The allocation to Category B operators of 30 percent of dollar banana licenses also violated GATS Articles II and XVII, and the allocation of licenses to ripeners violated GATS Article XVII. The panel predicted that the banana regime would encourage foreign service suppliers to invest in EU/ACP banana production and marketing, and acquire licenses from EU service providers. And that is what they did.

It proved to be difficult for the EU to respond to the panel and appellate reports in the WTO Banana case. After considerable debate, the Community enacted a revised banana regime effective January 1, 1999. Ecuador sought a compliance review by the original banana panel under Article 21.5 of the dispute settlement procedures in the WTO Dispute Settlement Understanding (DSU). The EU also sought review by the original banana panel and vindication of its own compliance under the same provision. The United States, taking a different reading of conflicting provisions in the DSU, sought WTO authorization to retaliate against EU trade; after some conflict, the EU accepted consideration of the U.S. request and immediately sought arbitration on the result, again by the original panel. The arbitrator/panel ruled on April 9, 1999 in the U.S. case and on April 12, 1999 in the Ecuador and EU cases, and found the revised EU regime again out of compliance.

The changes implemented in January 1999 had responded to the 1997 panel and appellate reports. The Community still maintained two tariff quotas, one of 857,000 tonnes for traditional ACP imports and another of 2.553 million tonnes for other bananas. The EU assigned import shares within the non-ACP quota for substantial suppliers, based on 1994-96 market shares.

Table 1. EU Tariff Quota Allocations

COUNTRY	SHARE (%)	VOLUME ('000 TONNES)
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4
Other	9.43	240.7
Total of the above	100.00	2,553.0

Note: from WT/DS/RW/ECU, p. 3. Calculation of shares done by Secretariat based on 2,553.0 million tonne tariff quota and the percentage shares according to Annex I to Regulation 2362.

Table 2. The EU Import Regime for Bananas since January 1, 1999

CATEGORY BANANA IMPORTS	ACCESS VOLUME	SOURCE/ EDITION	TARIFFS APPLIED	MODIFICATIONS OF THE EU TARIFF QUOTA REGIME UNDER REGULATIONS 1637 AND 2362
Traditional ACP bananas	857,700 tonnes	Imports without country-specific quantitative limits from 12 traditional ACP countries.*	Duty-free	<ul style="list-style-type: none"> • Elimination of country-specific allocations.
Non-traditional ACP bananas		Imports of traditional ACP quantities above the 857,700 tonnes or any quantities supplied by ACP countries which are non-traditional suppliers.	Duty-free up to 240,748 tonnes. For additional imports the bound out-of-quota duty (currently 737 Euro per tonne minus 200 Euro per tonne) applies.	<ul style="list-style-type: none"> • Elimination of country-specific allocations and "other" category totalling 90,000 tonnes. • Increase in duty-free access opportunities from 90,000 tonnes to 240,748 tonnes under the "others" category of the 2.553 million tonnes tariff quota. • Increase of the margin of preference for out-of-quota imports from 100 to 200 Euro per tonne.
Third-country bananas	2,553,000 tonnes	Imports from any non-ACP source.	75 Euro per tonne up to 2.553 million tonnes.	<ul style="list-style-type: none"> • Modified country-specific allocations allocated to four Members and an "others" category • Transferability of unfilled portions of country-specific allocations eliminated • Increase in access opportunities by 90,000 tonnes to 2.553 million tonnes as the result of the elimination of country-specific allocations to non-traditional ACP suppliers.

*Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname.

As for licensing, the operator categories and activity function rules were abolished. Instead, traditional operators (those who had been in operation in a preceding reference period) and newcomers were accorded access to 92 percent and 8 percent respectively of these quotas. The reference period for quota allocations in 1999 was 1994-96. Traditional importers were accorded licenses on the basis of quantities of bananas actually imported in the reference period; the proof of importation had to include a copy of the import license and proof of payment of customs duties. Excess requests for quota were cut back pro rata by a "reduction coefficient" and import licenses were made transferable. Under the "single pot" licensing system reference quantities for the ACP and MFN quotas were pooled, allowing a traditional operator to use its reference quantities based on past imports of traditional ACP bananas to apply for licenses to import third-country bananas and vice versa. Newcomers could also get quota allocation, but only if established in the EU and if they had been in the business of importing fruits and vegetables into the EU during the three years before the year in which the import license was sought.

The panel began by finding that the 857,000 tonne amount for traditional ACP suppliers was not an upper limit on a tariff preference, but a tariff quota, and so Article XIII applied. Access opportunities for traditional ACP bananas were in fact superior; the traditional ACP suppliers (none of whom reached the 10% threshold for substantial supplier status) had been given 857,000 tonnes, but the other under-10% suppliers were only given access to the 240,378 tonne "others" amount within the 2.553 million tonne quota. The traditional ACP suppliers had only filled 80 percent of their 857,000 tonne amount in 1994-96 but the dollar banana quota of 2.553 million tonne amount had been filled or overfilled; so the two groups were not "similarly restricted" in terms of Article XIII. As for allocation on the basis of a representative period, panel held that the "representative period" for Article XIII purposes must be the "most recent period not distorted by restrictions."²⁵ Thus, (1) the pre-1993 period of member state import regimes could not serve as a "previous representative period."²⁶ Because of the distortions introduced by preferential access for traditional ACP suppliers and

²⁵ Ecuador report, WT/DS27/RW/ECU, para. 6.39; US arbitrator report, WT.DS27/ARB, para. 5.26.

²⁶ Ecuador report para. 6.42; US arbitrator report para. 5.29.

the BFA, 1994-96 too could not serve as a previous representative period.²⁷ Neither would it be acceptable to use shares in the world market in any past period as a proxy, because different banana exporting countries have quite different market shares in different areas of the world.²⁸ The panel nevertheless found that based on Ecuador's share of the EU and world markets, the country-specific shares assigned to Ecuador and the other substantial suppliers did not approach the shares they would have had in the absence of restrictions, and were out of compliance with Article XIII.

In response to EU arguments that measures were required under the Lomé Convention (and sheltered by the extended GATT/WTO waiver for measures required by the Lomé Convention), the panel found that individual access amounts adding up to 857,000 tonnes for traditional ACP bananas could be considered to be required by the Convention, but that if the EU grouped all 857,000 tonnes into one tariff quota, an individual Lomé state could exceed its country-specific pre-1991 best-ever export volumes; if it did so, it would obtain a preferential tariff for imports beyond the scope of the Lomé waiver, and the EU would therefore violate Article I:1. In fact, shares had been shifting away from less-efficient Caribbean ACP exporters, in favor of more-efficient African ACP suppliers. The panel did rule that ACP suppliers had a right to access at a zero tariff within the "others" category of the MFN tariff quota, and to a 200 ECU/tonne preference for out-of-quota imports of non-traditional ACP bananas.

As for services issues, the panel agreed with both Ecuador and the United States that the choice of 1994-96 as the reference period for allocating licenses to importers produced a follow-on effect prolonging the original discrimination. Because most of the Category B licenses were allocated to EU firms, these firms would get the lion's share under the new regime. The third-country suppliers were in fact increasing share, but in order to do so, they had to buy licenses from favored EU or ACP firms (including ripeners) who had licenses in the 1994-96 period but did not want to import now.

No firm that had import rights would transfer them, except under arrangements that kept the physical license or otherwise retained its right to go on receiving risk-free quota profits for the indefinite

²⁷ Ecuador report para. 6.43-6.45; US arbitrator report para. 5.31-5.33.

²⁸ Ecuador report para. 6.46.

future. So the revised regime had carried forward the *de facto* discrimination of the earlier regime. Even the Commission had admitted that the new regime would “fossilize licence allocation in its present form.”²⁹ The criteria for newcomer access discriminated *de facto* against Ecuadorian and U.S. service suppliers. Although the “single pot” mechanism was not itself a problem, it could aggravate *de facto* discrimination through the use of a skewed reference period.³⁰

The Ecuador panel concluded by making a series of suggestions on the EU’s options for implementation. The EU had a number of options open:³¹

- A tariff-only system with no tariff quota and a tariff preference (at zero or another preferential rate) for ACP bananas. A waiver for the tariff preference would be needed unless a free-trade area consistent with GATT Article XXIV were created.
- A tariff-only system for bananas with a tariff quota for ACP bananas, covered by a suitable waiver (of Article XIII and perhaps also Article I).
- Retention of the present dual tariff quota system, either allocating no country-specific shares at all (e.g. through a first-come-first-served system) or allocating the shares by agreement with all substantial suppliers consistent with Article XIII:2. The MFN tariff quota could be combined with zero or preferential tariffs for ACP imports, if consistent with the Lomé Convention. Or the MFN tariff quota could be combined with a tariff quota for ACP imports (traditional or not) if an appropriate waiver (of Article XIII) is obtained.

The same panel, acting as arbitrator concerning the size of the U.S. proposed retaliation, measured the size of the “nullification or impairment” of rights through comparing the current situation with

²⁹ Ecuador report paras. 6.120-6.132; US arbitrator report paras. 5.62-5.80.

³⁰ Ecuador report paras. 6.143-6.149, 6.135-6.142; US arbitrator report paras. 5.89-5.95, 5.81-5.88.

³¹ Ecuador report paras. 6.154-6.159.

a series of “counterfactuals” representing possible paths toward compliance. The counterfactuals included:

- A tariff-only system including an ACP tariff preference (with effects calculated for a range of tariff rates).
- A tariff quota system allocated based on the first-come-first-served method
- A completely allocated tariff quota with country-specific allocations to all suppliers, and traditional ACP quotas reduced to equal actual past trade performance.
- The US base counterfactual which assumed a continued 857,000 tonne ACP quota and an expansion of the MFN quota to 3.7 million tonnes.

In the end, the panel chose to examine a counterfactual scenario of a global tariff quota of 2.553 million tonnes at a 75 Euro per tonne tariff, and unlimited access for ACP bananas at a zero tariff (covered by a waiver), and a different allocation scheme for licenses. It came up with a level of nullification or impairment of rights in the amount of US\$191.4 million per year; the WTO Dispute Settlement Body then granted the United States authorization to assess sanctions equal to that amount on EU products, and the authorized sanctions went into effect. On November 8, 1999, Ecuador requested DSB authorization for retaliation in the banana case. The same banana panel, convened to arbitrate the amount of retaliation, analyzed the same counterfactual and determined that the level of nullification or impairment for Ecuador amounted to US\$201.6 million per year. The DSB then authorized Ecuador to suspend its WTO obligations with respect to EC-origin consumer products, wholesale trade services and intellectual property rights in the areas of copyright, geographical indications and industrial designs.³² Ecuador never actually implemented any such retaliatory measures, arguing that they would hurt Ecuador worse than they would hurt the EU.

³² Ecuador arbitration report, WT/DS27/ARB/ECU, paras. 166-173.

Later Developments

AS of 1999-2000,³³ positions appeared to be as follows:

- The ACP preferred to keep the present regime and would not agree that the WTO makes it very difficult for the EU to provide the “best-ever” access provided in the Lomé Convention Banana protocol. Under the present (post-January 1999) banana regime, which did not provide individual country quotas within the total special access for ACP bananas, high-cost Caribbean suppliers were being squeezed out by efficient, low-cost African banana suppliers.
- The EU and the ACP concluded negotiations on Feb. 3, 2000 on a new ACP-EC Partnership Agreement. The new agreement provided for an initial 8-year preparatory period, during which the ACP countries would receive treatment substantially equivalent to that under the Lomé Convention and ACP agricultural products were promised “more favorable treatment than that granted to third countries benefiting from the most-favored-nation clause for the same products.” Bananas were promised “appropriate preferential access ... in the context of the Community’s future banana regime.”³⁴ The Lomé Banana Protocol expired and was not renewed. The EU requested a WTO waiver for the new Partnership Agreement, but Costa Rica, Ecuador, Guatemala, Honduras and Panama blocked consensus approval of the waiver until the EU made clear what arrangements would be made for bananas; the EU-ACP banana arrangements remained unclear pending resolution of the ba-

³³ “The Commission reports to the Council on consultations with a view to settlement of the banana disputes,” Sept. 10, 1999; on EU website at <http://europa.eu.int/comm/trade/miti/dispute/banana/1009bana.htm>.

³⁴ Article 1(2)(a) of Annex V, “Trade Regime applicable during the preparatory period referred to in Article 36(1)”; entry for bananas under item 08030019 in Annex to Annex V, “Joint Declaration concerning Agricultural Products Referred to in Article 1(2)(A). Text at http://europa.eu.int/comm/trade/pdf/acp_a5.pdf.

nana dispute.³⁵ A TRQ that provided for special access for the Lomé countries would require a waiver of not just Article I, which had been relatively common, but also Article XIII, which had only happened once in 50 years.

- The banana business itself remained in flux. The EU regime continued to stimulate vertical integration in the banana trade; banana importing countries continued to diversify into other fruit markets.
- The EU was unable to gain the consent of any of the complaining countries to a waiver of GATT Article XIII and remained unwilling to push through a waiver by vote in the WTO. The EU noted in September 1999 that its “numerous contacts have made it clear that complainants and parties involved are either not ready to grant such a waiver or only at a very high price.”³⁶
- Latin countries and exporters wanted to protect their rents and export earnings in the high-value EU market by keeping a TRQ, but disagreed on how to run the TRQ. Smaller Latin exporters sought They argued that they, too, are developing countries deserving of special treatment.
- Ecuador too sought a TRQ including an increase in Latin exports, and based on a reference period as recent as possible (since Noboa’s share of world and EU imports has been steadily increasing). Ecuador wanted only actual shippers to have access to the licenses, so that the quota would not have to be divided with the ripeners. Like the other Latin countries, Ecuador had acquired not just trading interests but, through their participation in EC imports, active interests in profiting off quota rents as licenseholders. Ecuador suggested a single TRQ of 3.3 million tonnes at 75 ECU/tonne; ACP shippers would be able to get licenses based on the 1994-96 reference period (when low-cost African bananas had had a comparatively lower share).

³⁵ “EU-US Banana Agreement Splits Latin Banana-Producing Countries,” *BNA Daily Report for Executives*, Apr. 19, 2001 p. A-5.

³⁶ *Id.*, p.3.

- In December 1999, Caribbean banana importers made their own proposal on the basis of discussions with Latin and US interests. The proposal was for a two-tier TRQ regime, as a transitional arrangement to a tariff-only regime. The first tier of 2.7 million tonnes would be unallocated and open at the same tariff rate to all suppliers. The second tier of 850,000 tonnes would be open to all; Latin bananas would pay a tariff of 115 ECU/t and all ACP bananas would enter duty-free. Bananas from the “most vulnerable ACP countries” (the Caribbean, not the more-competitive African suppliers) would receive an additional margin of preference. EC market prices would remain high. Licenses for almost all of the first tier would be initially distributed on the basis of a pre-1993 reference period to qualified operators (Category A, including only actual shippers), and in later years on the basis of actual license usage. Licenses for almost all of the second tier would be initially distributed using a 1995-97 reference period to qualified operators (who had purchased green ACP bananas) and in later years on the basis of actual experience. Within each quota, licenses could be used to import bananas from any source. There would be a newcomer category for 3.5% of each quota, and newcomers could not become traditional exporters later.³⁷ The US government endorsed this proposal.
- Some US interests would only accept a pre-1993 reference period, and others were opposed.

While all concerned endorsed the economic rationality of a tariff-only solution, the high rents of the existing regime remained attractive to all license-holders and others. A tariff-only solution would also be uneven in its impact. Under a tariff-only solution, trade within the ACP area would flow to the most efficient ACP suppliers in Africa, not the Caribbean. Efficient African producers would have a large tariff advantage in competing with Ecuador and Central America. In the renegotiation of tariffs that would be required under GATT Article XXVIII in order to raise the tariff, only

³⁷ Letter of PM Edison James of Dominica to Commissioner Franz Fischler, Dec. 1, 1999 (available on Inside US Trade website).

the principal suppliers and suppliers with 10 percent or more of the EU market would receive any compensation at all³⁸ – and if a country's major export to the EU were bananas, other tariff reductions would not provide any real compensation for the banana market access lost. There was also no guarantee that the tariff proceeds would in fact produce increased aid to the weakest suppliers in the Caribbean.

In May 1999, the EU outlined three options for resolving the banana dispute: (a) a tariff-only solution with a high tariff and duty-free access for ACP bananas; (b) retaining the two tariff quotas for third-country bananas and non-traditional ACP bananas, and giving traditional ACP bananas unlimited access duty-free; or (c) creating an additional tariff quota open to both ACP and other bananas, with ACP bananas entering duty-free. Licenses in the new tariff quota would be allocated on a first-come-first-served basis or through a striking-price auction system. The EU was and remained split on which option to adopt and the United States and Latin American countries opposed all.³⁹ Chiquita's continuing unhappiness with the banana regime, supported by U.S. beef exporters, led to a proposal to regularly rotate the targets of trade retaliation in the bananas and beef hormones disputes, the "carousel retaliation" bill which surfaced in September 1999 and was eventually enacted in May 2000 as part of the Trade and Development Act of 2000.

On November 10, 1999, the Commission then proposed a two-phase scheme of multiple tariff rate quotas. The current MFN quota of 2.53m would be kept and there would be a 850,000 tonne quota open to all at a tariff level with a maximum preference of 275 ECU/t for ACP bananas; license allocation could be FCFS, historical or by a "striking price" auction. The system would be replaced by a tariff-only system in 2006. This proposal too proved unacceptable

³⁸ Under Article XXVIII of the GATT, a party renegotiating a tariff item need only reach agreement with the principal supplier and "substantial suppliers" (countries whose exports are 10% or more of the imports of the item). Compensation is customarily provided in the form of reductions in the MFN tariff on other items of interest to the negotiating partner concerned. Obviously, if a country only exports bananas to the EU, it may not have any other items of interest that would compensate for losing its banana market access.

³⁹ "European Commission outlines options for resolving banana dispute with U.S.," BNA International Trade Reporter, June 2, 1999; "U.S., Latin American nations criticize EU for dragging its feet on banana reforms, BNA International Trade Reporter, July 28, 1999.

to one or more of the interests concerned. Latin countries and the United States had major problems with the tariff level; auctioning of licenses, which would capture the rents for the Commission, was obviously unattractive to any license-holder and would not simplify the regime, and there was no guarantee that the proceeds would translate into aid to affected banana producers. Auctioning was also criticized as WTO-inconsistent and liable to collusion among bidders.

In July 2000, the EU then announced that eight months of discussions had produced no agreement on which historical period to use, and that the auctioning proposal had been unsuccessful. The Commission announced it would pursue the November 1999 concept of three tariff quotas and examine first-come-first-served allocation of licenses for all three. If this were not acceptable, it would begin a renegotiation of the banana tariff under GATT Article XXVIII and move to a tariff-only system in the near term.⁴⁰ In October 2000, the EU formally proposed to shift to “first-come-first-served” allocation of import licenses incorporating special treatment for ACP bananas.⁴¹ While both Ecuador and one major banana trader, the Dole Foods Company, supported the first-come-first-served concept, the other major U.S. banana trader, Chiquita Brands International, strongly opposed it. The U.S. government rejected the proposal, echoed by Colombia, Costa Rica, Guatemala, Nicaragua and Panama;⁴² the EU member states were split.⁴³ EC and ACP

⁴⁰ “Commission gives new impetus to resolve banana dispute,” press release IP/0/07, July 5, 2000, available on Commission RAPID internet server.

⁴¹ “Commission proposes solution to end banana dispute,” release IP/00/1110 dated 4 October 2000, available from RAPID database; COM(2000), Communication from the Commission to the Council on the ‘First Come, First Served’ method for the banana regime and the implications of a ‘tariff only’ system, 4 October 2000.

⁴² “New Banana Import Scheme Faces Fresh Round of Nearly Global Criticism,” *BNA Daily Report for Executives*, 10 October 2000, p. A-8.

⁴³ “US, EU wrestle with Council banana decision before meeting,” *Inside U.S. Trade*, 13 October 2000; article reports split between Germany, Austria, Italy, Belgium (doubts about practicality and WTO-legality of current proposal, support for tariff-only system); France and Spain (support contingent on no change to a tariff-only solution); Netherlands (support for tariff-only but support for this proposal if it settles the dispute); UK (support for any proposal that solves the dispute and protects the Caribbean); Greece, Denmark, Luxembourg, Ireland (generally supportive); and Finland and Sweden (support conditional on transition to tariff-only solution). Greece and Portugal were also reported to oppose a tariff-only solution.

producers were unhappy, as well as EC importers.⁴⁴ In the United States, banana interests, acting in a coalition with beef exporters, had already stepped up pressure on the EU to settle, by securing enactment in June 2000 of “carousel” provisions requiring that USTR shift the targeting of WTO trade sanctions periodically to new products. A last EU attempt to reach a settlement with the outgoing Clinton Administration failed in mid-December 2000. Throughout 2000 and into the early months of 2001, banana and beef interests continued to push through their Congressional supporters for a new list of sanctions targets. Final months of negotiations in early 2001 produced the heterodox April 2001 settlement.

The April settlement has something for almost every one of the interests concerned. As noted above, the A and B TRQs remain, grouped for a total of 2,553,000 tonnes. The import licenses for the A and B TRQs are to be allocated to operators according to their historical market share in the 1994-96 period – a compromise by the EU. TRQ C is set at 850,000 tonnes and remains administered separately.

Effective July 1, 2001, the A and B TRQs will be treated as a single unit and import licenses for 83% of the A and B TRQs will be distributed to “traditional” operators based on each qualified “traditional” operator’s 1994-96 average final reference volume for the A and B quotas. Qualified traditional operators are primary importers (who own or buy bananas in the country of origin and ship them to the EU). Companies that had licenses due to their role as ripeners or secondary importers will lose them.⁴⁵ “Non-traditional operators” will be allocated 17% of the A/B TRQs (an amount close to the requests of Ecuador). Licenses for the C TRQ are intended to be distributed broadly in accordance with principles to be used in man-

⁴⁴ “Latin America adopts common stance against EU,” Eurofruit Sept. 2000, http://212.134.177.2/cgi-bin/frontend.cgi?showlink~fruitnet~c_euro_main_feature~23~ See also “US, EU banana talks fail to advance solution on new trade rules,” *Inside U.S. Trade*, 20 Oct. 2000 p.1; letter from ministers of Colombia, Guatemala, Nicaragua, Costa Rica, Honduras, Panama, Venezuela, *id.*

⁴⁵ “Banana deal effectively locks in U.S. share of EU market,” *Inside U.S. Trade* April 13, 2001; the same article states that the new definition gives the two U.S.-owned traders 44 percent of licenses (two-thirds for Chiquita) and will hurt some operators in Ecuador, and companies from Costa Rica and Colombia.

aging licenses for the A and B TRQs and on the basis of imports of ACP-origin bananas.⁴⁶ USTR has stated that within each TRQ, licenses can be used to import bananas from any source. As of July 1, 2001, there will be no country allocation of banana imports, permitting low-cost suppliers such as Ecuador to expand market share.

The United States and Ecuador each have agreed to support a waiver of Article XIII in order to legalize reservation of TRQ C for ACP-origin bananas – in a change of position on their part. After the waiver is approved, the EU will enact a second-stage regime, in which TRQ B will be increased by 100,000 tonnes and TRQ C will be reduced to 750,000 tonnes (transferring 100,000 tonnes from C to A/B), and TRQ C will be reserved for ACP bananas. Import licenses for the A/B TRQ will continue to be allocated in accordance with 1994-96 reference volumes through the end of 2003.

USTR has stated that the United States will suspend its sanctions as soon as the increased license allocations, as envisaged in this agreement, are made; the United States will terminate its sanctions upon the definitive adoption of a new EU regulation. USTR has also stated that the agreement is “WTO compatible, subject to WTO authorization.”⁴⁷

Conclusions and Lessons

THE agenda for this conference set two objectives: (i) to review the efficiency of legal techniques aimed at improving market access for developing countries and the justification for using such techniques in the current global trade liberalization context; and (ii) to analyze challenges, objectives and alternatives for existing trade preferential treatment in favor of developing countries. The banana story offers many lessons for both.

The Banana case certainly provides a negative example of efficiency in market access. As we have seen, the story began with country-specific regimes that reserved the UK, French and Spanish

⁴⁶ EU-Ecuador “Understanding on Bananas,” dated April 30, 2001 from *Inside U.S. Trade* website.

⁴⁷ “The U.S.-EU Banana Agreement: Frequently Asked Questions,” April 11, 2001, at <http://www.ustr.gov/releases/2001/04/faq.html>.

national banana markets for imports from overseas territories or associated countries with ex-colonial ties. Under these arrangements, in order to transfer \$1.00 net in banana aid, it cost EU consumers \$5.30 and the regime entailed \$1.00 of total waste. The lion's share of the rents went to banana trading companies that might or might not generate benefits for the dependent banana exporting countries involved. The country-specific regimes also created and reinforced divisions within the developing world, between the ACP countries and Latin exporting countries.

Yet these problems took a radical turn for the worse when the country-specific regimes were replaced by Regulation 404/93. Regulation 404/93 inflated the cost of each \$1.00 in banana aid, to \$13.25 out of consumers' pockets. The Regulation generates \$1 billion in quota rents each year. The extent of the quota rents, in fact, is clearly the factor that makes the problem hardest to resolve. While all parties recognize that in the end, a tariff-only solution coupled with direct aid is more efficient, less arbitrary, more accommodating of exogenous changes in the marketplace and more stable, tariff quotas still dominate in the short run. No solution exists that makes all of the major players completely happy. The final outcome – if this is it – is a real-world compromise.

The Banana case demonstrates the significant role that private stakeholder interests can have, for better or for worse. For worse, to the extent that the EU TRQ has been designed to maximize rents while giving relatively little thought to direct benefits for the developing countries; for worse, to the extent that stakeholder bargaining positions continue to focus first and foremost not on eliminating rents but on maximizing and capturing them. And for better, if the banana litigation has made possible a more efficient long-run solution with greater benefit to developing countries.

The Banana case also demonstrates how large, unpredictable and liable to manipulation the effects of quota discrimination can be. This lesson is of immediate relevance in relation to two current proposals for discriminatory quota-free access: the EU's "Everything but Arms" proposal for duty-free and quota-free access to the EU market for products of the least developed countries, and the quota-free access provided under the U.S. African Growth and Opportunity Act (AGOA). Every quota that limits trade generates rents. It is not clear what effects the EBA and AGOA initiatives will have in the real world, how large the rents will be, who will actually

capture the rents and who will be the real beneficiaries.

The Banana case also provides a positive example of policy entrepreneurship on the part of World Bank economists. The Bank economists Borrell and Yang took the initiative to recognize that banana trade was a trade problem that mattered for developing countries, build an economic model of the banana market which would generate credible estimates, and put those estimates into their series of *Bananarama* papers. They were the first to combine an interest in demonstrating how much rent there was in the system, the technical tools to do the job, and a platform to disseminate their ideas. Their work was constructive and if this is indeed the end of the story, their work has had a major influence on the outcome.

The Banana case shows us how discrimination in favor of one party can morph into discrimination against another. And it shows the power, and mischievousness, of trade policy solutions built around rents. The use of tariff quotas is not a feature unique to bananas; use of tariff rate quotas as a means to tariffy agricultural trade barriers in the Uruguay Round has created many rentful situations. And as we have seen in this case, every tariff quota presents the question of how it is to be allocated and who gets the rent. The biggest lesson for policy design may be that the more thought put into minimizing rents, the better – unless one is a lobbyist in Brussels.

Africa's Market Access under WTO, AGOA and the EU's EBA Initiative: Dimensions, Dilemmas, Prospects

GERRY NKOMBO MUUKA

*Associate Professor of Business Strategy
Assistant Dean and MBA Director
Murray State University
College of Business and Public Affairs*

Introduction

WHENEVER Africa was the subject of debate during the 20th Century, *Africa at the crossroads* was a theme that characterized many national and international workshops, seminars and multilateral trade discussions during the latter half of the Century. One year into the 21st Century, not much has changed on Africa's development landscape: the continent's development challenges remain largely intact, despite many and varied attempts at economic transformation and development.

One of the congenital challenges for Africa has been the issue of "Market Access" for African products and services on the global market. This paper discusses, and critiques, three of the most recent global initiatives at enhancing market access for goods and services from (and into) the continent: the World Trade Organization (WTO); the U.S-inspired African Growth and Opportunity Act (AGOA); and the European Union's groundbreaking "Everything But Arms" (EBA) Initiative.

Early in the paper a context is established for discussing the market access argument with regard to Africa. This is done by

looking not only at its definition, but also briefly outlining both congenital and recent magnitudes of the continent's development challenge.

Inspired by the widely shared view that Africa's economic *de*-marginalization can only be realized alongside an Enhanced Market Access Strategy (EMAS), the paper concludes with a multi-pronged approach towards Africa's economic transformation and development. This includes—but is not limited to—WTO enhancements, EU's EBA Initiative, salient features of the African Growth and Opportunity Act, as well as the undeniable role of regional integration initiatives such as COMESA, SADC and ECOWAS.

It is logical, perhaps, to precede the market access context employed here with a definition of *marketing* itself. Kotler (1994, p. 6) defines it as “*a social and managerial process by which individuals and groups obtain what they need and want through creating, offering, and exchanging products of value with others.*” Kotler goes on to point out that this definition rests on the core concepts of needs, wants, and demands; products and services; value, cost, and satisfaction; exchange, transactions, and relationships; and marketing and marketers. The electronic commerce (E-Commerce) and electronic business (E-Business) revolutions have not fundamentally altered the way we view marketing and related marketing concepts. In E-commerce, a market is still a network of interactions and relationships where information, products, services, and payments are exchanged (Turban, et al., 2000: p7). One major difference, of course, is that when the marketplace is electronic, the business center is not a physical building but rather a network-based location where business interactions occur (Turban, et al., 2000).

In international trade and multilateral-organization phraseology, the term “market access” has a somewhat different meaning from that traditionally employed by marketing scholars or electronic commerce revolutionists. Discussions of market access at and by the World Trade Organization (WTO), the World Bank, the European Union (EU) and others tend to refer mostly—though not exclusively—to both a country's access to export markets and the access that imports enjoy to its own markets (see, among others, Trade and Development Center, 2000). This “access”—of both developing countries to developed-country markets and developed countries to developing-country markets—tends to be seen in terms of how high (or low, in this case) a country's barriers (both tariff and non-

tariff) are to imports from other nations. It is precisely for this reason that the World Trade Organization was established at the Uruguay Round in 1993 (becoming operational in 1994): to “police” the international trading system, in search of “fair” trading practices among member countries of this international body. In mainly World Bank and IMF phraseology, *market access* is synonymous with trade liberalization, or the reliance on market forces to allocate global resources—by, among other things, lifting of controls in markets for commodities, the decontrol of internal price systems and internal and external trade flows, and removal of import restrictions.

What, then is the market access argument? Simply put, it is that some countries provide better *market access* or openness than others, even when reciprocity would dictate otherwise. At the global level, the major argument is that while markets in the developing world are more “open” to products and services from developed countries, some developed countries neither advocate nor practice due reciprocity. In some cases developed countries’ tariff reductions are highest in areas and commodities that are insignificant to developing nations. This is partly responsible for creating not only an unfair imbalance in terms of trade, but also for leading to different and low levels of economic development in developing countries. It must be clarified, from the outset, that whereas the bulk of market access acrimony has occurred between developing and developed economies, there have been equally strong sentiments among developed countries themselves (Japan versus the U.S), as well as between two or more developing nations (Zambia and Kenya versus South Africa, for instance) in connection with the Common Market for Eastern and Southern Africa—COMESA.

It is the developed versus developing country market access argument that is the subject of this paper, specifically as it relates to African exports and imports to (and from) the U.S market, that of the European Union, and other developed economies. Throughout this paper, unless otherwise specified, “Africa” refers to Sub-Saharan Africa (SSA)—defined for our purposes as all African nations with the exception of the Maghreb Arab North: Egypt, Algeria, Libya, Tunisia, Morocco and Mauritania. *What is Africa’s argument?* Simply put, that under World Bank and IMF conditionality (and cross-conditionality) in structural adjustment programs (SAPs), most African nations have liberalized their economies as a condition for

accessing loans from the two Bretton Woods Institutions (BWIs). Their major complaint is that while this has opened their markets further to foreign products and services, there has been no reciprocity on the part of developed countries to open their markets to African products and services.

In order to appreciate the urgency with which Africa views the need for market access reciprocity from developed countries, it is useful to understand the depth and breadth of the development challenge facing the continent, and why delays in brokering an *enhanced market access strategy* (EMAS) with the West will only exacerbate Africa's de-marginalization from the global economy. In the next section we look at some of the major developmental, social and economic challenges facing Africa.

Putting the Need for Better Market Access in Context: Overview of the Developmental Challenges Facing African Nations

AFRICA's development challenge is well documented in the literature, so it is not our intent here to provide an exhaustive listing and discussion of the subject. Rather, the idea is to briefly point these out so that a clear linkage can and should be made between the problems the continent faces, and the multi-pronged strategy needed towards a solution—of which the market access argument is *and should be* an important part.

Not necessarily ranked in any particular order, Sub-Sahara Africa's major development problems are as follows: a huge foreign debt burden; high poverty levels; high import dependence in the midst of high foreign exchange shortages and a narrow export base; high domestic interest rates; poor state of communications infrastructure; high costs of production; insufficient funding of export promotion activities and institutions; tariff and non-tariff barriers to trade; SAP-induced problems such as closures of local companies due to incapacity to compete with cheap imports; drought and disease-related structural problems; huge constraints to effective regional economic integration; and civil wars—to mention some of the more prominent problems the continent faces.

Debt can be used to illustrate the gravity of Africa's problems. No one is more succinct about Africa's debt problem than Boutros Boutros Ghali, Africa's first (Egyptian) UN Secretary General, who described external debt as a millstone around the neck of Africa. Africa's foreign debt is estimated at some \$230 billion (Diggs, 1999). There are several ways of appreciating the seriousness of Africa's debt problem. In 1995, for instance, at \$223 billion the debt was about 74.1% of the region's total GDP (Ramakrishnan, 1998). Secondly, the problem with these high levels of debt is that once individual countries divert scarce foreign exchange from their limited export proceeds to debt service payments, their other critical development needs—such as efforts at poverty reduction and educational, infrastructural, and health concerns—necessarily get sacrificed. Barnett (1990) makes the useful point that if poor countries like those in Africa are expected to invest in future productivity, and if they are ever to become meaningful global customers, then their crippling debt payments must be forgiven and forgotten.

Initiatives to Improve Market Access for Least Developed Countries (LDCs)

THE point was made earlier that market access is (and should be) an integral part of any strategy for addressing SSA's development challenge outlined in the preceding section. Three recent global initiatives that address the African market access question are worth discussing: general provisions of the World Trade Organization (WTO), the African Growth and Opportunity Act (AGOA), and the European Union's "Everything But Arms" (EBA) Initiative. We discuss each of these below.

The World Trade Organization (WTO)

There are a number of positive things for SSA from membership and participation in the WTO. The Trade & Development Center (2000) for instance points to the possibility of lower trade barriers for tropical agricultural products, and that liberalization in agriculture, textiles and other goods offer opportunities for African countries to branch out into new areas.

Potential does exist for example in horticultural products, fruits, vegetables, and other food products. These have a higher income elasticity (consumers are more likely to increase demand for these goods as they become wealthier) than basic commodities. They therefore present good export potential. The Trade & Development Center (2000) points to some other products identified as having good prospects for widening Africa's export base, including chemical elements and components, manufactured fertilizers, machinery, wood and wood products, non-ferrous metals, iron and steel, non-metallic minerals, animal feed, leather products and footwear.

Another benefit is in the area of increased technical assistance. Many Uruguay Round agreements provide for strengthened technical assistance for the poorest countries. The aim is to help African countries realize their full potential of gains through trade. The WTO gives the example of the WTO/UNCTAD/ITC Integrated Technical Assistance Program for selected African countries, launched in early 1996. It currently covers eight countries: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Kenya, Tanzania, Tunisia and Uganda. Benin, Uganda, Tanzania, Burkina Faso and Togo, which together account for not much more than US\$ 1 billion in exports.

Plunkett (1999) also points out that fuller integration of the African members into the WTO will provide multilateral commitments on tariffs and policies and impose a third-party dispute settlement mechanism, improving the reliability of the external trading framework. In this way, the WTO complements the ongoing African efforts at regional integration.

But as Plunkett (1999) observes, even given this improved structure, African countries are ill-equipped to participate actively in the dozens of WTO interest areas. The benefits of increasing participation are tempered by the bureaucratic obligations incurred by African governments. The increasingly technical nature of the WTO requires a degree of specialization in each portfolio very difficult to achieve in the top-heavy administrations of most African countries, already disadvantaged by scant budgetary resources.

Liberalization in emerging areas may provide African entrepreneurs with the opportunity to create the rapid economic growth deemed necessary to raise a substantial portion of the population out of poverty. Yet as the poorest aggregate region, Sub-Saharan Africa is most humanly affected by changes in the policies, technologies, and flows of food (Plunkett, 1999).

Sub-Saharan Africa and the U.S. Market: The African Growth and Opportunity Act (AGOA)

The Bill giving birth to the African Growth and Opportunity Act (AGOA) was first introduced in the U.S. Congress in April of 1997. It would be three years (January 2000) before both the U.S. Senate and the U.S. Congress passed it into law under the wider *U.S. Trade and Development Act of 2000*.

AGOA, an American initiative contained in some 28 sections, is aimed at establishing a new trade and investment policy for Sub-Saharan Africa (SSA). AGOA aims to “assist” African countries to reform their economic and political systems; build their civil societies; promote regional integration efforts, economic growth and the active participation of women in the economic process; strengthen and expand the private sector; reduce aid dependence; eradicate poverty; increase U.S. private investment on the continent; create free trade areas; reduce tariff and non-tariff barriers and other trade obstacles; and raise the profile of Africa and African issues in the U.S. (U.S. Congress, 2000; South Center, 1999; and Rice, 1999). Arguing that it is in the mutual interest of the United States and Sub-Saharan Africa to promote stable and sustainable economic growth and development in SSA, AGOA establishes key requirements that must be met by SSA recipients of U.S. foreign aid in order for them to benefit from increased trade ties and aid (Johnson, 1998; Rice, 1999).

As Muuka and Mwenda (2000) point out, the case for AGOA seems to revolve around 4 major arguments, namely: that it ends Washington indifference towards Africa and ends American Afro-pessimism; that it enhances reciprocal market access and American-African partnership; that the Act competitively positions the U.S. against both Europe and Asia in emerging African markets; and that the Act specifically jump-starts Africa’s textile and apparel industry. A closer look at the market access argument is warranted.

“American-African Partnership” in the Global Economy and the “Enhanced Market Access” Argument

Lugar (1998) argues that AGOA is the first serious attempt to formulate a new American strategy towards Africa, saying that it provides a general road map for expanding economic engagement and

involvement in Africa through enhanced trade and investment. Rice (1999) takes the position that the market access provisions of AGOA are vital to America's efforts to promote Africa's sustained economic growth in the 21st Century, adding that both Africa's challenges and opportunities underscore the need to establish a long-term relationship with Africa that also advances U.S. interests. AGOA, she argues, provides the framework for durable commercial partnerships with Africa's emerging markets, encourages successes, and builds on the progress many nations have achieved. "It is thus key to meeting one of our primary goals in the region—integrating African nations more fully into the global economy," and, one gets the implication, ensuring that Africa no longer participates at the fringes of international commerce.

There is, understandably, considerable opposition to AGOA provisions and eligibility requirements. Transafrica (1998) opens the barrage of criticisms against AGOA by arguing that its many provisions are aimed mainly at benefiting large foreign (mostly American) private investors and multinational corporations at the expense of what it calls "true and equitable African development." One of Transafrica's specific criticisms is that AGOA imposes strict conditions on African countries while setting no rules for American companies interested in investing in Africa. AGOA is seen as a "Christmas Tree" for U.S. multinationals. Other major criticisms are that AGOA pays inadequate attention to Africa's crippling debt situation, and that it only purports to provide enhanced market access for goods and products produced by SSA countries as well as textile and apparel benefits that encourage investment and the development of African trade in this sector. As Public Citizen (1999) points out, AGOA simply extends existing market access for African countries under the Generalized System of Preferences (GSP), an extension that will occur anyway, regardless of the fate of AGOA. The only new benefits are for textile and apparel, while failing to provide U.S. market access for a range of key African products covered by the Lome Treaty between African nations and the European Union (EU).

The European Union and Africa: The Groundbreaking EBA Initiative

The European Commission on 20th September 2000 adopted a groundbreaking plan to provide full access for the world's poorest

countries into European Union markets. The Commission's proposal to the Council would grant duty-free access to the world's 48 poorest countries. According to the European Union (2000), the proposal would cover all goods except the arms trade: "everything but arms". European Trade Commissioner Pascal Lamy welcomed the Commission's adoption of the proposal, saying: *"There has been plenty of talk about how market access for poor countries is critical if we are to tackle their growing marginalization in the globalizing economy. Everyone seems ready to make the commitment at the political level. But talk is cheap. We now need to move beyond opt-out clauses. It's time to put access to our markets where our mouth is. That means opening up across the board, and for all the poorest countries. So we want to move to liberalize everything but the arms trade. I hope the Council and Parliament can adopt this proposal swiftly and that other developed countries quickly follow suit."*

This initiative, pioneered by the EU in the run-up to the World Trade Organization (WTO) ministerial meeting in Seattle two years ago, would go beyond all previous EU commitments. The proposal reflects the Commission's belief that all WTO members can and should benefit from trade liberalization.

Mr. Lamy added: "We have been through this line by line, product by product, and have concluded that we should now take this important further step. Of course, some of the products are relatively sensitive, but there is no point in offering trade concessions on products which LDCs cannot export. We have to make a real difference. We of course recognize that duty free access alone is not enough to enable the poorest countries to benefit from liberalized trade. We need to help them build their capacity to supply goods of export quality, and we reaffirm the Commission's commitment to continued technical and financial assistance to this end".

Could a Combination of AGOA and the EU's EBA Initiative be "The Marshall Plan" Africa Needs?

Here is the Marshall Plan, in a nutshell. Post World War II Europe was in a mess, on a scale perhaps more than, but not unlike, what Africa faces as the 21st Century gets underway: the average European worker was eating far less than they needed (so are the majority of Africans today); foreign exchange was scarce, while inflation in Europe was rampant; many countries suffered political instability (Africa has her share of these today); and generally the war-torn,

war-wary European economies were in serious deterioration, a situation that answers to the description of Africa today.

On June 5, 1947, in what arguably would become the most important 1,200 word, 12-minute long commencement/graduation speech ever given at Harvard University, President Harry S. Truman's newly appointed Secretary of State—Army General George C. Marshall—proposed a program of massive economic aid to war-ravaged European nations (Bethel, 1997; Maier, 1997; Rostov, 1997; and Reynolds, 1997). The following highlights of the Marshall Plan, which led to Europe's reconstruction and development, are worth noting, and as we do so the reader is encouraged to assess whether a combination of AGOA and the EBA initiative could be the beginning of the long-awaited "Marshall Plan" for Africa.

Massive American Aid. With Winston Churchill calling it the "most unsordid act in history" and Prince Bernhard of the Netherlands many years later describing it as "an act without peer" (see Bethel, 1997), the Marshall Plan was remarkable for both the large amounts of money given to Western Europe and the positive economic reconstruction, growth and development that it ignited. During the plan's official 4-year practical duration (1948-1951), the United States pumped some \$13.3 billion into Europe—the equivalent of some \$85 billion in today's dollars—half of it on grant basis (see, among others, Friends of George C. Marshall, 1997; Gardner, 1997; and Maier, 1997).

Humanitarian Assistance and Economic Self-interest. In formulating and funding the European Recovery Program, the United States responded not only to humanitarian concerns, but to considerations of self-interest as well. An economically healthy Europe, the plan argued, would be America's best customer. Compare this self-interest to similar AGOA phraseology, as well as to the intentions of U.S. multinationals in Africa.

It is clear, from the above brief discussion of the Marshall Plan, that the AGOA and EU's EBA initiatives—while certainly steps in the right direction—are far from the kind of "Marshall Plan for Africa" that many Africans and African sympathizers have advocated over the years. The advocacy has arisen, in part, because Africa has by far the highest concentration of least developed countries (LDCs) of any continent, and that a self-interest does exist for all

developed countries to alter and improve this developmental imbalance.

Conclusions, Reflections and Recommendations

IF Africa is to resolve the huge development challenge facing the continent, it is clear that there is need for a multi-pronged approach that includes, among many things, an Enhanced Market Access Strategy (EMAS) for African goods and services. The strategy should be necessarily multi-pronged because of the *depth* and *breadth* of the problems Africa faces, as outlined briefly earlier in the paper. The overall strategy must include—but should not be limited to—the following:

- Coordinated and strengthened action in regional trading arrangements—notably the Southern African Development Conference (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the Economic Community of West African States (ECOWAS), with serious thought given to the benefits of merging SADC and COMESA to avoid unnecessary and at times costly functional duplication. For Africa, regional trading blocks such as these are a useful mechanism for integration into the multilateral trading system.
- At individual county level governments should assist companies and local chambers of commerce in the areas of market and marketing research, for them to gain requisite knowledge about customer needs and characteristics in developing markets they wish to enter and gain a foothold in.
- Coordinated and strengthened presence in—and relationships with—the major multilateral players in world trade such as the World Bank, International Monetary Fund, the World Trade Organization, the International Trade Center (ITC), the United Nations Conference on Trade and Development (UNCTAD), and the United Nations Development Program (UNDP).

With regard to the WTO, we share Punkett's (1999) view that there is also need for an *advocate* for the African countries, some

kind of filter to prevent or undo unwise trade commitments resulting from the Africans' disadvantage in analytical support at global level. The U.N.'s Economic Commission for Africa could be charged with such a task, complementing the efforts of groups like the Organization for African Unity.

As for AGOA, we believe that for it to be more than just an impressive paper process it must be people focused and matched—at implementation stage—not by the kind of uniformity and standardization that has plagued structural adjustment programs (SAPs) in Africa, but rather by flexibility and differentiation to each Sub-Saharan African nation's particular socio-economic and technological circumstances and challenges. The South Center (1999) presents this argument in sharper focus when it argues, quote:

"...while every effort to address Africa's development problems with all the seriousness they deserve must be welcomed enthusiastically, it is equally important, in the eagerness to win greater recognition in Washington for Africa and African concerns, not to get too carried away by gestures that are, in effect, symbolic, as they fail to address the domestic and international sources of the continuing crises of development on the continent. This is all the more crucial where such actions have the potential for posing serious difficulties for the internal economic and political governance of the countries of the continent."

The South Center (1999) goes so far as to warn—quite correctly in our view—that in the case of AGOA it becomes necessary to make a clear distinction between an attitude towards Africa that is merely part of a passing fashion or which is excessively driven by calculations of narrow self-interest, and an approach that represents a more rooted commitment seriously and openly to engage African perspectives on the past, present and future of the continent.

The EBA initiative, if actualized, offers by far the best hope, to this point, in Africa's quest for a level playing field in the name of market access to the developed West, given too that the European Union is the destination for more than half (55%) of Africa's exports. It is entirely possible for other global trading partnerships with Africa such as AGOA to follow the European Union's lead and provide duty-free market access to African exports. After all, as the Trade and Development Center (2000) points out, African exports make up only about 2% of world-wide merchandise exports and

about 2.2% of service exports.

Finally, the multi-pronged strategy towards Africa's economic transformation cannot be complete without an effective supply response from African countries themselves. This entails, among other measures, deepening their exports (both traditional and non-traditional) and broadening both the range of their exports and the destination markets to take advantage of wider market access; manufacturing value-added production (which entails more and better access to technology); and respective governments putting in place any such policy measures as will ensure a strong supply response and increased sources of foreign exchange.

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Trade and Environment

Synergies and Controversies

MODERATOR: DAVID FREESTONE, THE WORLD BANK

Minimising Conflicts and Enhancing Complementarity between Multilateral Environmental Agreements and WTO Agreements

RICHARD G. TARASOFSKY

Senior Associate, Ecologic

*Institute for International and European Environmental Policy
Berlin*

Introduction

THIS paper will focus on one of the core themes of the trade and environment problematique: the relationship between multilateral environmental agreements (MEAs) and the WTO. Agenda 21 calls for making trade and environment mutually supportive, which entails ensuring that both sets of multilaterally agreed rules must be made to work in harmony. However, to date, the international community has not succeeded in making this happen.

As will be discussed below, the actual problems vary in kind and degree, depending on the instrument or issue involved. However, global attempts to address the problematique at large have not yet taken legally-binding form.

Both Agenda 21 and the Rio Declaration encapsulate the extent of global agreement possible in 1992, which has not changed substantially since. The elements of this consensus are:

- An open economic system is necessary.
- Trade-related environmental measures based on an international consensus are preferred, although the use of unilateral measures is not completely ruled out.
- Trade measures to achieve environmental objectives may be necessary, but should be based on certain agreed principles so as to avoid trade distortions (e.g. non-discrimination and transparency).

Although non-binding, both the Rio Declaration and Agenda 21 were significant in affirming that trade liberalisation and environmental protection are both necessary to achieve sustainable development. This has also helped foster increased cooperation at the global level between the WTO and MEA secretariats on environment and trade issues.

However, despite this increased cooperation and extensive discussions at the global level, no solution have yet been found to resolve the legal ambiguity concerning how trade measures in MEA interact with WTO rules. This has resulted in a reluctance to agree on trade measures in new MEAs (e.g. the recent Biosafety Protocol was only adopted after protracted negotiation and contains ambiguous language vis-à-vis the WTO, and trade issues were among the most contested in the POPS negotiations).

Although the achievement of full mutual supportiveness as between MEAs and the WTO may ultimately require some changes in the law, this paper will focus on what can be accomplished within the existing rules, particularly those provided by MEAs. Both MEAs and the WTO rules tend to leave implementation decisions to the Parties, which means that the presence or avoidance of actual conflicts will often be found only during the implementation stage. Thus, the recommendations made at the end of the paper will focus on what can be done during implementation of the WTO and MEAs to enhance harmony.

Harmonious implementation of WTO and MEA rules a necessary goal in itself — so that States can fulfil all their international

obligations. But given that negotiation is constantly taking place in the frameworks of most MEAs, as well as the WTO, lessons learnt through implementation can also assist States in improving the global rules that govern them.

The Nature of The Interaction between MEAs and The WTO

SEVERAL reasons underlie the tensions between MEAs and the WTO. The development of the international instruments dealing with trade and environment was, until recent times, done in relative isolation from the other. Different sets of national bureaucrats were involved in negotiating laws and policies that were not considered to be related to each other. Therefore, it is not surprising that not all these rules fit together in a supportive manner.

The culture and world-views of trade and environment law and policy-makers differ. Both free trade and environmental advocates consider their projects to be in the public interest and, at the same time, fragile and easily derailed. However, while advocates of free trade see a free market as an end in itself (i.e. all barriers to trade should be removed because of their adverse economic and social effects), the environmental constituency sees trade as a means to achieving the aim of conservation and sustainable development. Thus, from the environmental standpoint, free trade can send the right signals, under certain circumstances (e.g. when prices internalise environmental externalities); under other circumstances it requires control (i.e. the erection of trade barriers) so as to ensure that the environment is not affected. In addition, environmentalists are sensitive to the fact that as trade increases, the end-consumer becomes further removed from the production process and the impact that has on the environment. As such, the traditional ability of local people to manage their natural resources, as both users and consumers of these resources, becomes challenged by international trade. On a deeper level, free-traders aim at eliminating economic inefficiencies, whereas environmentalists tend to be more willing to accept short-term economic cost for longer-term environmental gain.

In certain circumstances, trade liberalisation can help meet an environmental objective in an MEA. However, in other cases, liberalised trade is considered an environmental threat which must

be managed through an MEA. In yet other cases, MEAs contain rules which do not seek to manage trade, but which deviate somewhat from the rules provided for in the WTO Agreements. Therefore, the severity of the conflicts between MEAs and the WTO depend on the nature of the specific trade measures contained in the MEAs.

Trade Measures in MEAs

TRADER measures in MEAs are used to achieve a variety of environmental purposes:

- To create market opportunities and incentives to use or dispose of a good in an environmentally sound manner.
- To discourage unsustainable exploitation of natural resources.
- To discourage environmentally harmful production processes.
- To prevent the entry of a harmful substance into a country.
- To induce producers to internalise the costs to the environment caused by their products or production processes.
- To prevent export States with lower environmental standards from gaining a competitive advantage in import States with higher standards.
- To prevent the migration of industries to countries with lower environmental standards.

MEAs contain trade measures often as part of a broader package that include financial and technical assistance. Just as the purposes of trade measures in MEAs vary, so too do the types of measures available. The range of measures extends from specific requirements on parties, to non-specific trade measures taken pursuant to an MEA, so as to achieve the MEA's objectives.

Specific Trade Measures in MEAs

Examples of specific trade-related measures in MEAs include:

- Establishing quantitative restrictions on the international movement of goods and services, as between parties to the treaties, as well in relation to non-parties.
- Requiring permits on the export or import of goods and services.
- Requiring the labelling of goods and services traded internationally.
- Establishing trade sanctions in cases of breach of environmental obligations.

Some prominent MEAs that employ specific trade measures are as follows:

THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES)

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was negotiated to prevent the over-exploitation of endangered species through international trade.

Pursuant to Article III, the Convention bans commercial trade in species most threatened with extinction (listed in Appendix I). It strictly controls trade in other species (listed in Appendix II) that might be threatened with extinction unless trade in them is controlled. The Convention operates by requiring both export and import permits for Appendix I species and export permits for Appendix II species. Appendix II permits can only be issued once a finding has been made that the export will be non-detrimental to the species in question. The Convention also creates Appendix III, which lists species nominated by individual Parties, for which those Parties undertake to issue export permits.

The Convention prohibits trade in listed species with non-Parties unless those countries meet the requirements applicable to Parties of CITES. Article XIV(1) of the Convention allows Parties to

impose stricter domestic measures. That provision has been used as the legal basis for the occasional imposition of collective bans on trade with Parties found to be in non-compliance with the Convention by the CITES Standing Committee. Article XIV(2) stipulates that the Convention does not affect the obligations of Parties deriving from any “treaty, convention, or international agreement relating to other aspects of trade ... of specimens”.

THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER

The Montreal Protocol on Substances that Deplete the Ozone Layer sets production and consumption limits for specific ozone-depleting substances. In order to support these phase-outs, the Protocol prohibits trade in controlled substances, and in products incorporating these substances, with non-Parties that do not observe the Protocol’s production and consumption limits. The Protocol also provides that, if feasible, Parties may be required in the future to ban trade with non-observing non-Parties in products made with such substances. However, it was subsequently decided that this would not be feasible.

The Protocol requires Parties to discourage the transfer to non-observing non-Parties of technology for producing and using controlled substances. Trade restrictions can also be imposed by a decision of the Meeting of the Parties, based on the recommendation from the Implementation Committee that a Party is in non-compliance with the Protocol.

THE BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES AND THEIR DISPOSAL

The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal aims at reducing the generation and transboundary movement of hazardous wastes, particularly their transportation to and disposal in developing countries.

The Convention recognizes the right of Parties to ban the importation of hazardous wastes. It also establishes a regime of “prior informed consent” to govern trade in hazardous wastes. Exporting Parties must honour the wishes of the importing Party by prohibiting the export of such wastes unless the importing Party specifi-

cally authorizes the shipment in writing. The Convention requires Parties to prohibit the export or import of hazardous wastes when the importing or exporting Party has reason to believe that the wastes will not be handled in an environmentally sound manner. Trade in hazardous wastes with non-Parties is prohibited unless it is governed by bilateral or regional agreements conforming to equivalent environmentally sound management.

The 1995 meeting of the Conference of the Parties (COP) decided to amend the Convention by requiring members of the OECD, European Union, and Liechtenstein to prohibit all transboundary movement of hazardous wastes to all other states. The ban immediately covered hazardous wastes destined for final disposal and by the end of 1997 extended to hazardous wastes destined for recycling or recovery. Although the amendment is still not in force, it is being applied.

Non-specific Trade Measures in MEAs

In addition to the specific trade measures highlighted in the aforementioned MEAs, several MEAs raise the possibility of parties taking trade measures to fulfil their objectives, without actually specifying these trade measures. Examples of these measures may be found in the Convention on Biological Diversity and the Framework Convention on Climate Change. Article 8(1) of the Convention on Biological Diversity calls for the regulation of processes and activities that adversely affect biodiversity, which implicitly may include cases of international trade. In the case of the Framework Convention on Climate Change, a non-specific measure may be a border-tax adjustment aimed at offsetting any competitive disadvantage arising out of carbon taxes aimed at meeting that treaty's emissions reduction targets. However, Article 3 of the Climate Change Convention, entitled "Principles" also states, in subparagraph 5:

The Parties should cooperate to promote the supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones,

should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

So far, no specific trade measures have been elaborated under the UNFCCC or its 1997 Kyoto Protocol. However, as this regime develops further, several trade-related issues might arise in the context of energy-taxes, trade in services and subsidies, particularly as developed country parties take measures to meet their reduction commitments.

There are also trade measures in MEAs that fall into grey areas, i.e. somewhere between specific and non-specific types of measures, where some degree of multilateral approval under MEAs is discernible for taking non-specific measures. For example, the United States, has threatened to enact trade sanctions vis-à-vis non-parties of the International Whaling Convention who do not complying with the terms of that Convention or resolutions of the International Whaling Commission. Another example has been referred to earlier in this book, namely Article XIV(1)(a) of CITES, which allows for the taking of stricter domestic measures and has been the basis for collective sanctions against Italy and Thailand for breaching the treaty. Article 23(3) of the Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks authorises parties to adopt regulations

to prohibit landings and transshipments where it has been established that the catch has been taking in a manner which undermines the effectiveness of multilateral fisheries conservation and management measures on the high seas.

WTO Provisions That Risk Conflicting with Provisions in MEAs: Focus on Intellectual Property Rights

IN addition to trade measures in MEAs possibly conflicting with WTO rules, conflicts can also exist the other way around: i.e. particular provisions in the WTO Agreements that appear to

contradict norms in MEAs. An example of this scenario is the rules laid down on intellectual property rights under the WTO TRIPS Agreements.

IPRs do not relate directly to biodiversity conservation. But they do form part of the economic and social context in which conservation takes place. Thus, considerable controversy has arisen recently as to the relationship between the TRIPS Agreement and the Convention on Biological Diversity.

The purpose of the TRIPS Agreement is to create an internationally agreed minimum, but strong, standard set of rules for the protection and enforcement of intellectual property rights. Intellectual property rights were placed on the international trade agenda primarily by industrialized countries. They perceived significant differences in IPR protection as barriers to trade and were concerned about the consequences of these differences on their ability to make foreign direct investments and to market their products. The negotiations of this Agreement were politically charged, with many developing countries preferring to deal with these issues in other fora. However, the political gap on this has lessened, to some extent, by the acceptance by most States of the TRIPS Agreement through becoming Members in the World Trade Organization.

Article 7, entitled "Objectives" states the following:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The TRIPS Agreement establishes a detailed set of substantive standards for IPRs, including remedies, all of which are grounded in the fundamental GATT "most favoured nation" and "national treatment" requirements. Also included are procedural requirements relating to transparency and notification. The Agreement Establishing the WTO creates the WTO Council for Trade-Related Aspects of Intellectual Property Rights. The mandate of this Council is to monitor compliance with the TRIPS Agreement and provide Members with a forum for consultation. The TRIPS Council is to review

the implementation of the Agreement five years after the entry into force of the TRIPS Agreement, i.e. in 2000.

Article 27 sets out rules regarding patentable subject matter. After requiring that patents be available for all inventions, paragraph (2) states that:

Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

According to Article 27.3 (b), Members may also exclude from patentability:

Plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

The review of Article 27.3 (b) of the TRIPS Agreement took place in 1999, but did not result in any substantive changes.

Much of the debate so far has been theoretical, although some practical work has also begun. There are at least several areas of concern, each discussed in detail below.

Genetic Resources

Responding to demands of developing countries, the CBD reaffirms State sovereignty over the natural resources under their jurisdiction, which includes genetic resources. This is important since the classic bioprospecting model involves a developing country as the provider of genetic resources and a (more powerful) developed country as the user. Article 15 of the Convention creates a complex

scheme to facilitate access to genetic resources “on mutually agreed terms”. It provides for the fair and equitable sharing of benefits arising from use of genetic resources, also on “mutually agreed terms”. This creates a normative and procedural framework for negotiations between providers and users of genetic resources aimed at achieving equitable results. It is in the crafting of the benefit sharing arrangement that IPRs play a role.

The first issue is a general one. Does the presumption that IPRs will be attached to the results of research and development based on genetic resources affect the balance of bilateral bargaining envisaged by the CBD? While, *prima facie*, IPRs could strengthen the position of the user of genetic resources, by providing it with something to trade away during bargaining with the provider, this effect has not yet been quantified. It is therefore unclear whether the sharing of benefits will be any less equitable as a result of the TRIPS Agreement.

Specific legal issues arise from the use of plant genetic resources to improve plant varieties. The TRIPS Agreement makes special provision for improved plant varieties in Article 27(3)(b). As noted above, Members must protect plant varieties either by patents or by an effective *sui generis* system or any combination thereof. What was likely in the mind of the negotiators of the TRIPS Agreement was the 1961 International Convention for the Protection of New Varieties of Plants (UPOV Convention), as amended, whose evolution reflects a tightening of IPRs. The 1978 amendments to the UPOV Convention provide for the following:

- “plant breeder’s right” — an IPR for commercial marketing of a plant’s propagative material.
- “farmer’s privilege” — allowing a farmer who buys a seed to save what results from its crop for the next season without paying anything additional to the plant breeder.
- “breeder’s exception” — an entitlement for third parties to freely use material from protected varieties to create new varieties.

The 1991 amendments to the UPOV Convention provide that the “farmer’s privilege” is to be subject to national discretion. This removes the presumption in its favour, but allows national legisla-

tion to still provide for it. In addition, the “breeder’s exception” was narrowed by excluding it from “essentially derived varieties”, which extends the original plant breeder’s rights to new varieties that include the original genotype. New Parties can now only join UPOV 1991, since accession is no longer possible to UPOV 1978.

The criticism by environmentalists of UPOV is that it creates a harmful reliance on high yield improved strains of crops, which may adversely affect biodiversity. As such, IPRs in agricultural products may create a bias towards centralized crop breeding research – e.g. in powerful agricultural firms – leading to:

- Decreased crop diversity.
- Decreased spatial genetic diversity.
- Decreased temporal genetic diversity.
- Increased use of external inputs.
- Displacement of traditional systems of informal innovation of plant varieties that tends to foster agricultural biological diversity.

Since the TRIPS Agreement does not specify UPOV in its text, alternative arrangements may be developed. But it is unclear what will constitute an acceptable *sui generis* system; i.e. how will the term “effective” be interpreted in this context?

Indigenous and Local Knowledge

Indigenous and local communities are often the custodians of biological diversity. As such, various references in the CBD are made to indigenous and local communities, including Article 8(j), which requires Parties to, as far as possible and as appropriate:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional life-styles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval

and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices (emphasis added).

However, the TRIPS Agreement may be incompatible with these objectives. It is unclear the extent to which holders of traditional knowledge can exercise control over their knowledge and receive compensation for its use by others under the terms of the TRIPS Agreement. Particular concern exists in respect of patents. One difficulty is that indigenous and local communities may not be able to fulfil the “novelty” requirement for receiving a patent, since this knowledge has often been in their communities for generations (i.e. is no longer novel). Another is that patents are granted for a limited period of time, whereas traditional knowledge may be very old. Although trade secrets are a form of IPR that is not time-bound, they too may not be applicable because, like all IPRs, they are individual entitlements, whereas traditional knowledge is usually held collectively. On the other hand, it might be conceivable to extend the “geographic indications” provisions in the TRIPS Agreement to products derived from traditional knowledge, but there has so far been no official movement in that direction.

Environmentally-unsound Technologies and Products

Another controversy relates to whether IPRs should be granted for environmentally unsound technologies and products. As mentioned above, Article 27(2) of the TRIPS Agreement also allows Members to exclude from patentability from inventions necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.

Article 7(c) of the CBD requires Parties to identify processes and categories of activities that have or are likely to have significant adverse effects on conservation and sustainable use. Article 8(1) then requires Parties, as far as possible and as appropriate, to regulate or manage these processes and categories of activities. Thus, the CBD provides the authority to regulate the grant of patents for environmentally unsound technologies and products that harm biodiversity.

While there may be some overlap between the TRIPS Agreement and the CBD on this point, their applicability in practice may differ because of their different approaches to risk. The CBD emanates from a precautionary approach, which is anticipatory in nature. By contrast, the TRIPS Agreement provision cited above which employs the thresholds of “necessity” and speaks of “serious prejudice to the environment”, which is more easy to demonstrate on an *ex post facto* basis.

A related issue is the controversy over granting patents to life forms. As noted above, Article 27(3)(b) of the TRIPS Agreement excludes the patentability of plants and animals, with some exceptions. The 1999 review of this provision did not change this, but the issue may be revisited in the future. The CBD provisions on harmful processes and activities may mitigate against granting such patents, to the extent that they are linked to threats to biodiversity.

The International Law of Treaties and The Potential Conflicts between MEAs and WTO Rules

THERE is no specific mention of MEAs in the WTO rules. Thus, *prima facie*, trade measures pursuant to MEAs, like all other trade related environmental measures, may find themselves running afoul of WTO norms. So far, there has not been a case before a GATT/WTO panel involving trade measures taken pursuant to an MEA. It is therefore difficult to predict how such a case will be handled. Nonetheless, some observations may be made on the basis of international treaty law.

Article 30 of the Vienna Convention on the Law of Treaties provides for the case of conflicts between treaties relating to “the same subject matter”:

- (2) When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
- (3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to

the extent that its provisions are compatible with those of the later treaty.

- (4) When the parties to the later treaty do not include all the parties to the earlier one:
 - (a) as between States parties to both treaties the same rule applies as in paragraph 3;
 - (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

However, some observations must be made about the applicability of these provisions:

- Article 30(2) of the Vienna Convention appears to be relevant to only a few global MEAs, as most are silent on the relationship to other treaties. None of the global treaties adopted so far mention the WTO specifically, although the preamble to the Biosafety Protocol does recognise that trade and environment agreements should be mutually supportive. One example of a treaty which addresses other international obligations is CITES Article XIV (2), which states that CITES does not affect obligations of parties deriving from, *inter alia*, any agreement “relating to *other* aspects of trade” (emphasis added). “Other” in this case is not defined, but may refer to aspects of trade not related to conservation, thereby implying that it takes precedence over WTO rules where those trade rules interfere with the protection of endangered species from international trade. Another example is Article 22(1) of the Convention on Biological Diversity, which states:

The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

Thus, to the extent that harm to biological diversity results from, or is threatened by, international trade, this provision implicitly provides the CBD with precedence over WTO rules. A final example is more ambiguous. Article 15(4) of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade provides that:

Nothing in this Convention shall be interpreted as restricting the right of the Parties to take action that is more stringently protective of human health and the environment than that called for in this Convention, provided that such action is consistent with the provisions of this Convention and is in accordance with international law.

The question that is begged is what “in accordance with international law” means and how this relates to WTO law.

- Article 30(3) of the Vienna Convention creates a priority for conflicting treaties based on time. However, it is unclear how to apply this in this context. Even if it is agreed that the relevant date to go by is the adoption of the instrument (and this is debatable), the GATT is a confusing case. On the one hand, the GATT 1947 is legally distinct from GATT 1994 by virtue of Article II (4) of the WTO Agreement, and is thus prior in time relative to most MEAs. On the other hand, however, the Uruguay Round Agreements were adopted on 15 December 1993 – later than most MEAs. By the same token, the Vienna Convention is silent on how to consider the timing of a decision taken by the governing body of a treaty that creates a trade-related environmental measure. For example, the Third meeting of the Conference of the Parties of the Basel Convention decided to amend that Convention so as to prohibit the movement of hazardous waste from OECD countries to non-OECD countries. The Basel Convention amendment comes later than the adoption of the Uruguay Round, although the adoption of the Basel Convention itself, which contains other trade measures, precedes the Uruguay Round. Since the Vienna Convention refers to a priority of “treaties”, rather than “measures”, the result is very unclear.
- Article 30(4) of the Vienna Convention, which deals with the case where some States are not parties to both treaties might

seem sensible, but it assumes that a treaty is capable of being separated into different sets of legal relations depending on the parties. While this may be appropriate for treaties based on specific compromises, both WTO law and MEAs attempt to establish global standards based on uniformity rather than reciprocity. Thus, application of this provision may not be entirely satisfactory.

In addition to the treaty provisions, customary international law also contains a rule called *lex specialis*, whereby a more specialised treaty prevails over a more general one. Trade measures taken pursuant to MEAs are usually more specific than the general rules of the WTO, in that they tend to refer to particular items. There are, however, exceptions to this proposition. For example, provisions in the TBT Agreement or the S&PS Agreement may be more specific than in MEAs, and certainly the TRIPS Agreement is more specific than the references to IPRs in the CBD. But even in the latter case, the argument could be made that the CBD is more specific in referring to IPRs in the particular context of conservation of biological diversity. Despite these vagaries, there is a certain appeal to the application of *lex specialis* in this context.

Given the uncertainty in applying Article 30 of the Vienna Convention, and rather than assuming actual conflict between WTO and trade measures pursuant to MEAs, a better approach might be to ask whether the relevant treaties can be interpreted so as to be compatible.

Article 31 of the Vienna Convention on the Law of Treaties articulates the rules for treaty interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty;

- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- 3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
- 4. A special meaning shall be given to a term if it is established that the parties so intended.

In the United States – Standards for reformulated and Conventional Gasoline case, the WTO Appellate Body noted that Article 31:

forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed, by Article 3 (2) of the DSU [Dispute Settlement Understanding], to apply in seeking to clarify the provisions of the General Agreement and other “covered agreements” of the Marrakesh Agreement Establishing the World Trade Organization... That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.

Based on Article 31 of the Vienna Convention, it is arguable that trade-related environmental measures in MEAs fall within the scope of the GATT general exceptions in Article XX(b) and (g). The “context” referred to in Article 31(1) and (2) can further support this argument, by reference to the commitment to environmen-

tal protection and sustainable development expressed in the Preamble to the Agreement Establishing the WTO. No subsequent agreement, as contemplated by Article 31(3)(a), has yet been concluded between MEA or WTO parties, although this may prove an attractive option in the future. Some of the proposals made in the CTE for an interpretative understanding might fall within this category.

“Subsequent practice”, as in Article 31 (3 (b)), is helpful only to the extent that it relates to the particular instrument in question. In the second Tuna/Dolphin case, the GATT panel ruled that practice under other bilateral and multilateral instruments that cover similar subject matter cannot be seen as “subsequent practice” under the GATT. Nonetheless, there is evidence of a growing, but as yet, somewhat ambiguous, permeation of sustainable development in WTO practice itself.

Article 31(3)(c) has never been applied by the WTO Dispute Settlement Body, although it might prove a useful basis for interpreting WTO rules in a manner that preserves the integrity of MEAs. There exists some controversy, however, among the legal scholars as to whether this provision includes other rules of international law as they existed at the time of the treaty’s adoption or those that are more contemporary. Either way, though, GATT 1994 was agreed at a time when the body of international environmental law was increasing, in both customary and treaty form.

Thus, an application of Article 31 might lead to interpretation of Article XX that allows WTO members to implement trade-related environmental measures required by MEAs. The harder cases will be those arising from non-specific measures taken pursuant to MEAs. Finally, it should be noted that both GATT and WTO dispute panels have expressed preferences for multilateral solutions to environmental problems. Indeed, discussions in the WTO Committee on Trade and Environment, although not conclusive, tend to favour deference to MEAs.

Proposals on Reconciling MEAs and The WTO Rules

SINCE the early 1990s, several proposals have been made to resolve tensions between MEAs and the WTO. Most of the official debate on this has occurred within the WTO Committee on

Trade and Environment. Proposals have ranged from various possible amendments to the WTO Agreements to non-binding agreements. However, to date, none of the proposals made have been accepted. Thus, the legal uncertainty continues.

In the run-up to the 1996 Singapore Ministerial Conference, several proposals were made on reconciling MEAs with the WTO. But it is important to preface any description of these proposals with the observation that not all delegations were of the view that any changes to the *status quo ante* were necessary. Indeed, some developing countries were of the view that the current regime can sufficiently accommodate legitimate trade-related environmental measures.

Switzerland proposed changing Article X of the Agreement Establishing the WTO to create a “coherence clause” which would apply across all WTO Agreements. This clause would provide that in case of conflict between WTO rules and a specific trade provision of a listed MEA, the WTO dispute settlement process would assume both the legitimacy and the necessity of the provision (presumably complying with Article XX(b) and (g)), and would only test it against the chapeau of Article XX (which is aimed at preventing protectionist abuse).

Other proposals were for a non-binding understanding on the interpretation of GATT Article XX to be developed, which would assist WTO dispute resolution panels in dealing with cases involving MEAs. These proposals could be divided into two categories:

- Those which proposed criteria for MEAs to be accommodated by the WTO.
- Those which proposed criteria for specific trade measures contained in MEAs to be accommodated by the WTO.

In the former case, criteria proposed included clearly specified environmental objectives, scientific evidence of the environmental problem, open and transparent negotiating process, and openness of membership to all States sharing the environmental problem. In the latter case, criteria proposed included specificity of the trade measures in the MEA text, necessity, least trade restrictive, effectiveness, and proportionality.

New Zealand proposed a gradation of testing by WTO dispute settlement procedures:

- Measures taken against MEA parties, which were specifically mandated and notified, would be exempt from WTO challenge.
- No special protection from a WTO challenge would be granted for a non-specified measure taken against a non-party to an MEA.
- Measures taken pursuant to but not specifically mandated by an MEA, or specifically-mandated measures taken against non-members of an MEA, would be subject to specific tests under the WTO dispute settlement procedures.

Korea too put forth a proposal with a sliding scale of disciplines, depending on the specificity of the mandate in the MEA for the trade measure.

Several developing countries favoured granting specific WTO waivers for MEAs. ASEAN and Hong Kong proposed guidelines for granting such waivers. The ASEAN proposal was based on a "quid pro quo", whereby the grant of a waiver to be accompanied by a commitment not to resort to non-specific measures pursuant to the MEA.

The European Union proposed two alternatives. One was to add a paragraph (k) to GATT Article XX, which would have the effect of allowing measures to be taken pursuant to MEAs complying with a separate Understanding that would set criteria for qualifying MEAs. Dispute settlement panels would only test a trade measure meeting the terms of the Understanding against the chapeau of Article XX. The alternative was to add the term "environment" to Article XX(b).

The recommendations contained in the 1996 CTE report to the Singapore Ministerial Conference reveal some movement on these issues. For example, Paragraph 173 of the report states:

... Trade measures based on specifically agreed-upon provisions can also be needed in certain cases to achieve the environmental objectives of an MEA, particularly where trade is related directly to the source of an environmental problem.

Paragraph 174(ii) of the report further states:

A range of provisions in the WTO can accommodate the use of trade-related measures needed for environmental purposes, including measures taken pursuant to MEAs. That includes the defined scope provided by the relevant criteria of the “General Exceptions” provisions of GATT Article XX. This accommodation is valuable and it is important that it be preserved by all.

Since 1996, there have been a few more proposals made. In 1999, Canada proposed a “principles and criteria” approach to clarifying the relationship between the multilateral trading system and trade measures in MEAs. MEA negotiators would use these criteria in determining the need for trade measures and WTO dispute panels would rely upon the principles. Also in 1999, Switzerland was of the view that amending Article XX was not desirable since it would reopen debate on a balanced provision that had been long negotiated. Rather, its proposal was for an interpretative “coherence clause” to clarify the relationship between MEAs and the WTO. This would be adopted as an Understanding at a Ministerial Conference. More recently, Switzerland has refined its proposal to call for an “interpretative decision” that would ensure that MEAs and the WTO maintain their primary competence and pay deference to the competence of the other.

As indicated above, so far none of these proposals have met with overall acceptance. Indeed, it seems likely that any changes to the WTO rules relating to MEAs will only be possible in the context of a new negotiating round.

Final Observations and Recommendations

GIVEN the lack of consensus at the global level on what action, if any, needs to be taken to ensure harmony between the treaties, this final section will make recommendations for action within the existing WTO and MEA frameworks.

As regards the WTO, Parties should ensure that action taken to implement trade-related environmental measures be done in a man-

ner that takes account of the implications of the WTO rules. Legislators should be mindful of the relevant provisions of the GATT 1994, as well as the requirements in other relevant Agreements. Where it is deemed necessary to deviate from WTO rules, then close attention should be paid to the exceptions (e.g. in GATT Article XX) and the relevant case law. Although the jurisprudence has not yet directly addressed a conflict between WTO and MEA rules, it does provide some guidance as to the limits of the exceptions provisions, and what Parties should consider in applying these provisions. This should be particularly helpful in cases where Parties to MEAs wish to develop non-specific trade measures.

WTO Parties should also seek opportunities for pursuing environmental objectives within the WTO structures. For example, negotiations under the “built-in agenda” to shape the future services and agriculture regimes should be done with MEAs in mind. So too should reviews of the Dispute Settlement Understanding, the TRIPS Agreement and the Subsidies Agreement. Efforts should also be pursued to resolve trade tensions arising from non-specific trade-related environmental measures through negotiation in WTO bodies, such as the Technical Barriers to Trade Committee and the Sanitary and Phytosanitary Measures Committee. However, it may not be possible to fully achieve environmental objectives under the WTO, in which case Parties might then turn to possibilities offered under MEAs to further clarify the role of such measures.

In addition, much can be done within the framework of MEAs, such that the multilateral basis for departing from WTO rules is strengthened. It should be recalled that the WTO Dispute Settlement Body has on several occasions indicated a preference for multilaterally agreed trade measures, as opposed to those agreed unilaterally. Thus, MEAs are frameworks for the further clarification of what trade measures are to be permitted and under what circumstances.

Thus, some examples where action can be taken in the implementation of MEAs to reduce conflicts with the WTO or even complement the WTO:

- Assessing the implications of national trade policy in the course of implementing Article 6 of the CBD (national biodiversity plans and strategies) and Article 14 (impact assessment) so that any regulation of trade or deviation from WTO rules has a strong empirical basis.

- Applying Article 11 of the CBD (incentive measures) to review existing subsidies and other economic instruments, which may ensure compliance with the Agreement on Subsidies.
- Developing “sui generis” systems for protecting indigenous and local knowledge (e.g. under Article 8(j) of the CBD that can be applicable under the TRIPS Agreement).
- Strengthening the application of the “significant trade process” under CITES to keep species listed on Appendix II (instead of being uplisted), thereby reducing conflicts with the rules on quantitative restrictions under the GATT 1994.
- Applying technology transfer requirements in MEAs in a manner consistent with liberal trade norms as well as requirements under TRIPS.

In addition, MEA COPs can be used to develop multilateral guidance on issues where lacunae in the law exist. Examples include labelling (e.g. under CBD or Biosafety Protocol), e.g. in relation to the Agreement on Technical Barriers to Trade, or the application of the precautionary approach for alien species under the CBD, e.g. in relation to the Agreement on Sanitary and Phytosanitary Measures.

Finally, two general comments. MEAs are often packages of rules containing both trade restrictions and “positive measures” aimed at helping or encouraging developing countries to avoid being in the position of being subject to trade restrictions. Thus, in many cases, these “positive measures” could be strengthened, including building institutional capacity to implement all elements of the MEAs. Secondly, since conflicts between MEAs and WTO are often reflections of discord within national capitals, States should take steps, or receive assistance, to reduce conflicts and emit coherent external policies on trade and environment. Here again, capacity building could prove particularly useful.

An Introduction to the Rules of the World Trade Organization: An Environmental, Health and Safety Perspective

PAUL E. HAGEN, ESQ. and JOHN BARLOW WEINER, ESQ.

*Beveridge & Diamond, P.C.
Washington, D.C.*

Introduction

THE World Trade Organization (WTO) is the single most important source of international law on trade relations and one of the most influential forums with respect to the development of environmental health and safety (EH&S) law. As such, it has become a focal point of “trade and environment” analysis and debate regarding the relationship between the rules of international trade and development and implementation of EH&S measures.

The WTO came into existence in 1995, following the final round of trade negotiations, known as the Uruguay Round, among the contracting parties to the General Agreement on Tariffs and Trade (“GATT”). In the Uruguay Round, the contracting parties to the GATT took three major actions. They established the WTO, formalizing the institutional structure established to implement the international trade rules set forth in the GATT in the years following World War II. They broadened and deepened the range of rights and obligations applicable to party governments (“Members”), and they replaced a more diplomatic system of international trade regulation under the GATT, which relied ultimately upon negotiation to

resolve disputes, with a system establishing enforceable rules. The WTO membership encompasses the great majority of nations participating in international trade (with China, Russia and Saudi Arabia being notable exceptions), including not only the world's leading economies but most of the developing world as well. WTO Members are bound by a number of agreements limiting their rights to restrict, directly or indirectly, trade in foreign goods and services.

To an even greater degree than did the GATT, the WTO can be expected to influence the development of EH&S law, whether at the international, regional, national or even local level. As discussed more fully below, five of the WTO agreements in particular inform and establish rights and obligations that are likely to discipline the development of EH&S measures by WTO Members: the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh" or WTO Agreement); the GATT; the Agreement on Sanitary and Phytosanitary Measures ("SPS" Agreement); the Agreement on Technical Barriers to Trade ("TBT" Agreement); and the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Additional agreements such as the Agreement on Agriculture, Agreement on Subsidies and Countervailing Duties, General Agreement on Trade in Services, and Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS" Agreement), also address EH&S issues in noteworthy ways, as discussed more briefly below.

While these agreements obligate WTO Members to promote fair and open trade, they also recognize the right of WTO Members to regulate goods and services to achieve legitimate public policy goals, such as EH&S objectives. In some respects the interrelationship of WTO rules and EH&S law is fairly straightforward. In others, it remains a topic of sometimes divisive debate. In all cases, an understanding of the WTO as an institution and the terms of relevant WTO agreements is essential to a sound analysis of how the WTO regime may impact the development of EH&S measures worldwide, and how interested parties can become involved with the process.

The WTO: An Overview

THE WTO currently has nearly 140 Member governments, each of which has ratified the WTO Agreement, including all of the

“Multilateral Trade Agreements” (“MTA”s) annexed to it. Headquartered in Geneva, Switzerland, the WTO as an institution serves a number of functions, namely:

- Administering the WTO trade agreements.
- Providing a forum for trade negotiations.
- Settling trade disputes.
- Reviewing national trade policies.
- Offering technical assistance and training to developing countries.
- Cooperating with other international organizations.

WTO Bodies

Through the various WTO bodies, the WTO membership implements, assesses and interprets the WTO agreements. Members can also adjust these agreements and can negotiate new ones.

COMPOSITION AND DECISION-MAKING

Participation in bodies of the WTO is generally either open to all Members or mandatory. In other words, every Member can participate in most every body. As a result, even the determinations of relatively subordinate bodies may carry substantial weight as the manifestation of the general consensus of the membership.

Decisions are made by the entire membership, typically by consensus. Decisions can also be made by vote, but this has never occurred under the WTO (and was extremely rare under the WTO’s predecessor, the GATT).

ORGANIZATIONAL STRUCTURE

The Member bodies are generally organized largely into a hierarchy consisting of four levels:

The Ministerial Conference. At the top of the structure is the Ministerial Conference. It is ultimately responsible for accomplishing the functions of the WTO. Required to meet at least biennially, it has the authority to take decisions on all matters under any WTO agreement at the request of any Member.

The General Council. The General Council (the members of which typically include ambassadors and heads of delegation in Geneva, though sometimes officials sent from members' capitals) acts for the Ministerial Conference between meetings of the Conference. It also sits as the Dispute Settlement Body and the Trade Policy Review Body.

Area-Specific Councils. Three additional councils, each dedicated to one of the three areas of trade addressed by the WTO agreements, operate under the guidance of the General Council. These are the Councils for Trade in Goods, Trade in Services, and Trade-Related Aspects of Intellectual Property Rights. These councils perform the functions assigned to them by WTO agreements and the General Council.

Agreement-Specific Committees. Various committees report to the three area-specific councils. Most WTO agreements establish committees to facilitate implementation of the particular agreement. The most significant of these committees for purposes of EH&S are:

- The SPS Committee (established by the SPS Agreement).
- The TBT Committee (established by the TBT Agreement).

The Council on Trade in Goods oversees various other sector and issue specific committees, including Committees on Agriculture and on Subsidies and Countervailing duties. There is no TRIPS committee, only the TRIPS Council, nor is there a committee dedicated to the implementation of the GATT. The Council on Trade in Services is supported by Committees on Trade in Financial Services and Specific Commitments and working parties on domestic regulation and GATS rules.

Committees on Topics of General Concern, Working Groups and Working Parties. In addition, a number of committees address specific topics of general concern, such as balance of payments, budget, finance and administration, and trade and development. These committees generally report to the General Council. Several Working Groups and Working Parties also address specific issues, in some cases of general interest, in others relevant only to a particular area of trade (such as financial services). The most significant of these bodies from an EH&S perspective is the Committee on Trade and Environment.

Committee on Trade and Environment. The Committee on Trade and Environment (“CTE”) is unique within the WTO as the only body dedicated solely to the consideration of issues relating to the environment. The CTE is tasked to evaluate the need for adjustments to any WTO agreements in light of various considerations regarding the relationship between these agreements and the development of environmental measures.

Specifically, the CTE’s charter calls for it to consider:

- The trading system and the use of trade measures for environmental purposes, including trade measures contained in multilateral environmental agreements.
- Environmentally related trade policies and environmental.
- Policies that have significant trade effects.
- The trading system and environmental taxes and charges.
- The trading system and environmental product related requirements, such as packaging, labeling and recycling standards.
- The trading system and the transparency of environmental trade measures.
- The dispute settlement rules of the trading system and those contained in multilateral environmental agreements.
- Market access, particularly for developing countries, and environmental trade measures.

- The trading system and the issue of domestically prohibited goods.

Member governments have prepared numerous papers of interest regarding these issues for discussion by the CTE, and the CTE itself issues annual reports on its progress pursuing its mandate.

WTO Secretariat

The WTO Secretariat, based in Geneva, has around 500 staff, headed by a director-general. Its annual budget is close to 120 million Swiss francs.

RESPONSIBILITIES

The Secretariat plays an important and sensitive role at the WTO. It facilitates such activities as trade negotiations, assessments of Member compliance with WTO obligations and dispute settlement. In addition to furnishing administrative and technical support, it provides expert analysis, including of the rights and obligations established under WTO agreements.

The Secretariat's duties include:

- Suppling technical support to the WTO bodies.
- Providing technical assistance to developing country Members.
- Analyzing world trade.
- Providing some forms of legal assistance in the dispute settlement process.
- Offering advice to governments wishing to become members of the WTO.
- Explaining WTO activities and affairs to the public and media.

RESTRICTIONS ON WTO STAFF AND MEMBERS

The objectivity and disinterestedness of the Secretariat, its "international character," are carefully protected. Both its staff and the WTO

membership are expressly required to respect the international character of its responsibilities. The staff is forbidden to seek instruction from any Member or other entity, and individual Members are forbidden to attempt to influence the Secretariat's performance of its duties.

Key Agreements

The Marrakesh Agreement

The Marrakesh Agreement establishes the WTO as a legal entity, delimits the general scope of its activity, details its general functions, and defines its overall structure. As discussed more fully below, the various substantive agreements ("Multilateral Trade Agreements" or "MTAs") the governments agreed to incorporate into the WTO Agreement during the Uruguay Round of negotiations are annexed to the Marrakesh Agreement and subordinate to it.

Sustainable Development. For the first time in the context of the GATT/WTO multilateral trading system, the Preamble to the WTO Agreement refers to the objective of sustainable development and the need to protect and preserve the environment. Specifically, the first paragraph of the Preamble states:

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development

The Appellate Body (which hears appeals of decisions of dispute resolution panels as discussed more fully below) has found

this preambular language relevant to the interpretation of provisions of the various MTAs, including GATT Article XX exceptions (also discussed more fully below). *See* Report of the WTO Appellate Body, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DSS8/RAB/R (1998).

GATT

SCOPE & OVERVIEW

The General Agreement on Tariffs and Trade as adopted in 1947 (the “GATT 1947”) is incorporated into the WTO Agreement, along with various interpretative decisions, protocols and Understandings, as the “GATT 1994” (referred to here simply as the GATT for convenience, unless greater precision is needed). It imposes a wide range of basic disciplines to promote open, non-discriminatory trade practices among WTO Members with respect to trade in goods (as opposed to services).

As a general matter, the rules established under the GATT apply to trade in goods among WTO Members unless these rules conflict with those established under another MTA, in which case the provisions of that other agreement prevail. *See* General Interpretative Note to Annex 1A to the Marrakesh Agreement.

WTO Members are obliged to take reasonable measures to ensure the observance of GATT obligations by regional and local governments and authorities. *See* Article XXIV(12).

Because of the broad applicability of GATT rights and obligations, their similarity to terms of other WTO agreements, and the relatively extensive interpretation the Agreement has received, due to its age and scope, the GATT warrants careful consideration for purposes of trade and environment analysis.

KEY RIGHTS & OBLIGATIONS

Most-Favored-Nation and National Treatment. The GATT establishes two of the most fundamental principles of international trade law, which are incorporated as well into regional and bilateral trade agreements around the world, “Most-Favored-Nation Treatment” or “MFN” (or as it has more recently been dubbed in the United States, “Normal Trade Relations”) and “National Treatment.”

Collectively, these principles essentially call upon governments to impose the same burdens and grant the same benefits to equivalent goods regardless of the country in which the goods are produced or for which they are destined.

MFN. GATT Article 1(1) obliges WTO Members generally to accord to any product originating in or destined for any other WTO Member the same treatment as any “like product” originating in or destined for any other country (whether a WTO Member or not) with respect to: customs duties; other charges relating to import or export; the method of levying such duties and charges; all other rules and formalities connected to importation and exportation; internal taxes or charges; and domestic laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of a product.

National Treatment. GATT Article III(2) essentially requires WTO Members not to impose internal taxes or charges upon imported goods that are higher than those imposed upon “like domestic products”; and Article III(4) requires Members to accord no less favorable treatment to imported products than like domestic products with respect to laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of a product. These Article III requirements apply regardless of whether the measure is imposed or enforced within the territory of the WTO Member or at the time or point of importation, as a point of importation measure (*see Ad Article III*).

Quantitative Prohibitions and Restrictions. GATT Article XI prohibits WTO Members from imposing quantitative restrictions such as quotas or licensing requirements on products imported from or destined for any other country, except for prohibitions and restrictions imposed under specific, listed circumstances (relating to food shortages, commodity regulation, and fisheries products). An Article III point of importation measure that embargoes non-qualifying imports does not violate Article XI.

Article XIII establishes corresponding obligations not to discriminate in the administration of permissible quantitative restrictions. Specifically, the Article forbids WTO Members to prohibit or restrict the import from or export to any other WTO Member of any product unless the import from or export to all other countries of like products is similarly prohibited or restricted. In addition, MFN

and National Treatment obligations under Articles I and III, respectively, may also apply.

Transparency of Measures. GATT Article X is significant as a mandate for transparency of WTO Member legal requirements.

Article X imposes a broad, general requirement for all WTO Members to publish “promptly,” in a manner enabling all governments and traders to become acquainted with them, all laws, regulations, judicial decisions and administrative rulings of general application that: pertain to classification, valuation, duty rates, taxes or other charges or requirements, restrictions or prohibitions on import or export; or that affect the sale, distribution or transportation, insurance, warehousing, processing mixing or other use of products.

Nullification or Impairment of GATT Rights. Article XXIII provides for a remedy in the event that any benefit accruing to a Member is being nullified or impaired, or an objective of the Agreement is being impeded. Article XXIII(b) in particular grants a WTO Member the right to seek a remedy even if such nullification, impairment or impedance is not due to an act or omission conflicting with the provisions of the GATT. Not surprisingly, in light of the potential of this provision to render the other provisions of the GATT irrelevant, Article XXIII(b) has been applied with caution. *See e.g.,* WTO Panel Report, *Japan -Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (1998).

EXCEPTIONS

Article XX: General Exceptions. GATT Article XX protects the right of WTO Members to adopt and enforce measures falling within any of ten listed categories.

Arbitrary or Unjustifiable Discrimination and Disguised Trade Restrictions. The chapeau (introductory paragraph) to the Article establishes as threshold requirements that a measure must not be applied in a manner constituting a means of “arbitrary” or “unjustifiable” discrimination between countries or a “disguised” restriction on international trade.

Significant Categories of Protected Measures. From an EH&S perspective, the most significant of the ten listed categories of protected measures are those:

- “Necessary to protect human, animal or plant life or health” (art. XX(b)).
- “Necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of the Agreement” (art. XX(d), essentially an administrative convenience exception).
- “Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption” (art. XX(g)).

SIGNIFICANT INTERPRETIVE ISSUES

“Like Product Analysis.” As noted above, the MFN and National Treatment obligations under Articles I and III, respectively, (among other provisions of the GATT) impose obligations to treat “like products” in a similar or equivalent manner. If two products are not “like,” they need not be treated consistently. Therefore, an important threshold question is how to interpret the term “like product”.

Analytical Criteria. It is fairly well established that the analysis of whether products are “like” should be undertaken on a case-by-case basis. Several criteria are generally considered relevant, namely:

- The product’s end-uses in a given market.
- Consumers’ tastes and habits.
- The product’s properties, nature and quality.
- The product’s tariff classification in the Harmonized System.

See, e.g., Report of the Working Party on Border Tax Adjustments, adopted on December 1970, BISD 18S/97; Report of the Appellate Body, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999).

Like Product Analysis v. Article XX Analysis. Although a product's properties, nature and quality are considered appropriate criteria to consider in like product analysis, potential or actual EH&S risks or impacts of a product are not. Rather, such risks and impacts have been considered public policy concerns distinct from the product itself, which WTO Members may address as they see fit, so long as any measures taken qualify for an exception under Article XX.

"Necessity" Analysis. The term "necessary" for purposes of Article XX(b) has been interpreted to require use of the least GATT inconsistent means reasonably available to fulfill the health policy objective. *See* GATT Dispute Panel Report, *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, B/SD 37S/200 (1990). As discussed below, the unnecessary obstacle to trade standard under the TBT Agreement adopts essentially the same interpretation of the term "necessary."

"Relating" to Analysis. Panels have interpreted the term "relating to" under Article XX(g) to require a measure to be "primarily aimed at" the conservation of the natural resources at issue. *See, e.g.,* Report of the WTO Appellate Body, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DSZ/AB/R (1996).

Extraterritorial EH&S Measures; Regulation of PPMs. Article XX does not explicitly distinguish between measures taken to address EH&S risks or impacts within the territory of a WTO Member and those taken to address risks and impacts outside a Member's territory. Under what circumstances a WTO Member can impose trade restrictions on the basis of a product's EH&S impacts outside the territory of that Member remains uncertain.

Several disputes, including some brought before the contracting parties prior to entry into force of the WTO Agreement, have addressed this issue, specifically with respect to measures taken to address the environmental effects of the manufacturing process or production method ("PPM") of a product.

- **Unilateral Measures.** Dispute settlement decisions have recognized the theoretical right of a WTO Member to impose unilaterally an extraterritorial environmental measures. *See* GATT Dispute Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R (1994) (unadopted); Report of the

WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DSS8/AB/R (1998) (“Shrimp/Turtle”). However, no such measure has been upheld to date, except for a measure establishing a voluntary product labeling regime. *See* United States – Restrictions on Imports of Tuna (1991) (unadopted).

- **Multilateral Measures.** Decisions have indicated a preference for multilateral, rather than unilateral action, with a recent decision indicating that trade sanctions imposed in accordance with an MEA would receive a more deferential review than would restrictions imposed unilaterally. *See Shrimp/Turtle*. The WTO membership has in the past informally acknowledged that the WTO should review MEAs somewhat deferentially, but also indicated that use of trade sanctions to promote the purposes of an MEA may only be appropriate in certain cases and should be linked to specific provisions of the MEA. *See, Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (12 November 1996). Nonetheless, no decision has expressly addressed the permissibility of trade measures taken in accordance with an MEA.
- **Trade Measures Applicable to Non-Parties.** Several existing MEAs, such as the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), do, in fact, provide for the imposition of trade sanctions against non-parties.

A WTO Member could challenge trade measures imposed in accordance with these or other MEAs even if the Member were also a party to the MEA. It might be argued, however, that by becoming party to the MEA, the WTO Member has consented to be subject to such trade measures so long as they are applied in a manner consistent with the Members’ expectations in light of the terms of the MEA. Most concern has focused on trade sanctions applicable to WTO Members that are not parties to an MEA.

Activity outside the WTO also reflects an ongoing debate among governments (and government departments) regarding the proper relationship between multilateral trade rights and obligations and MEAs. For example, during the negotiations for several recently concluded MEAs as well as the ongoing negotiations for an MEA that has not yet been concluded, some negotiating governments have called for the inclusion of a provision to protect existing rights and obligations under other international agreements, including the WTO agreements. In some instances, ambiguous preambular language has been included as a compromise solution.

SPS Agreement

SCOPE & OVERVIEW

The Agreement on Sanitary and Phytosanitary Measures (“SPS” Agreement) addresses measures taken to protect the life and health of humans, animals and plants, solely within the territory of the WTO Member. Specifically, the Agreement applies to any measure, which might directly or indirectly affect international trade, taken to:

- Protect humans, animals and plants from risks arising from the spread of pests, diseases, disease-carrying and disease causing organisms.
- Protect humans and animals from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages and feedstuffs.
- Protect humans from risks arising from diseases carried by animals, plants and products thereof, or from the entry, establishment or spread of pests.
- Prevent or limit damage due to the entry, establishment and spread of pests.

See Annex A (Definitions). WTO Members are obliged to take measures to support the compliance of subfederal governmental bodies and to take such reasonable measures as may be available to them to ensure compliance of non-governmental bodies. *See* Article 13.

KEY RIGHTS AND OBLIGATIONS

Necessity. Article 2(2) requires WTO Members to ensure the application of SPS measures “only to the extent necessary to protect human, animal or plant life or health.” Article 5 establishes parallel requirements to ensure that SPS measures are no more trade restrictive than “required” to achieve the Members appropriate level of SPS protection.

Scientific Evidence and Provisional Measures. Article 2(2) also requires WTO Members not to maintain SPS measures in the absence of sufficient scientific evidence. Members are permitted to adopt SPS measures provisionally, on the basis of pertinent available information, even if relevant science is insufficient. However, they are obliged to seek to obtain additional necessary information and to review the measure accordingly within a reasonable period of time. *See* Articles 2(2), 5(7).

Arbitrary or Unjustifiable Discrimination and Disguised Trade Restrictions. Article 2(3) establishes prohibitions against arbitrary or unjustifiable discrimination and disguised restrictions on international trade, corresponding to those found in the chapeau of Article XX of the GATT. Article 5 establishes parallel requirements with respect to making determinations of appropriate levels of SPS protection.

Presumption of Consistency with the GATT. Article 2(4) provides that SPS measures that conform with the terms of the SPS Agreement shall be presumed consistent with the GATT as well.

Risk Assessment and Management. Article 5 requires WTO Members to base SPS measures on a risk assessment, taking into account available scientific evidence and relevant economic factor. In addition, when determining an appropriate level of SPS protection, Members should take into account minimization of trade effects.

Equivalence Recognition. Article 4 requires importing Members to accept SPS measures of exporting Members as equivalent, even if these measures differ from their own, if the exporting Member objectively demonstrates to the importing Member that the measure

achieves the level of SPS protection deemed appropriate by the importing Member.

Use of International Standards. Article 3 encourages WTO Members to base their SPS measures upon international standards or guidance.

- (1) **Necessity and Consistency with the GATT.** Article 3(2) provides that SPS measures which conform to international standards, guidelines or recommendation shall be considered necessary to protect human, animal or plant life or health and presumed to be consistent with the GATT.
- (2) **Right to Impose Higher Standards.** Article 3(3) recognizes the right of WTO Members to impose higher levels of SPS protection than would be achieved by measures based on international standards, guidelines or recommendations, either if there is a scientific justification or to achieve the level of protection the Member deems appropriate in accordance with Article 5.

Transparency of SPS Regulations. Annex B to the SPS Agreement requires prompt publication of all SPS regulations in a manner that enables Members to become acquainted with them. It also requires, except in extraordinary circumstances, that Members allow a reasonable interval between publication and entry into force of SPS measures to allow producers in exporting Member countries to adapt their products and production processes accordingly. In addition, the Annex obligates Members to establish enquiry points to answer “all reasonable questions” from interested Members and provide relevant documents, including materials concerning SPS regulations, control and inspection procedures and risk assessment procedures.

Member Notice and Comment. If a WTO Member wishes to apply an SPS measure the content of which differs substantially from that of international standards, guidelines or recommendations, or in the absence of such international standards or guidance, Annex B requires the Member to provide other Members a reasonable opportunity to review and comment upon the proposed SPS measure, and to take these comments into account.

SIGNIFICANT INTERPRETIVE ISSUES

The Role of Science. The SPS Agreement is remarkable for explicitly imposing detailed obligations for WTO Members to consider and rely upon scientific evidence as a basis for the measures they apply. As a result, a central focus of attention with respect to the SPS Agreement has been the various obligations relating to consideration and reliance upon scientific evidence.

Scientific Basis for Measures not Based on International Standards. Among the more significant determinations to date have been that, unless an SPS measure is based upon an international standard or guidance, it must be rationally related to the results of a risk assessment undertaken in accordance with Article 5 and available scientific evidence. *See, e.g.,* Report of the WTO Appellate Body, *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (1998); Report of the WTO Appellate Body, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999).

Implications beyond the SPS Agreement. While the GATT, the TBT Agreement and other MTAs of interest from an EH&S perspective may not include detailed explicit requirements for WTO Members to consider or rely upon scientific evidence, analyses of the legitimacy of EH&S measures have and can be expected to take into account the justification of such measures in light of available scientific evidence. Similar examinations undertaken in the context of the SPS Agreement may inform such analyses.

TBT Agreement

SCOPE & OVERVIEW

The Agreement on Technical Barriers to Trade (“TBT” Agreement) addresses both mandatory and voluntary product standards that create technical barriers to trade (i.e., that interfere with trade without regulating trade as such). The TBT Agreement does not apply to measures qualifying as SPS measures for purposes of the SPS Agreement.

Specifically, the Agreement addresses mandatory “technical regulations” and voluntary “standards,” defined in Annex 1 as follows:

Technical Regulation. A “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.”

Standard. A “[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.”

This discussion focuses upon rights and obligations relating to the development and adoption of technical regulations and standards. Similar, parallel rights and obligations also apply with respect to conformity assessment procedures.

WTO Members are required to take such reasonable measures as may be available to them to ensure the compliance of local governments and non-governmental organizations, except with respect to specified procedural requirements. *See* Articles 3, 4, 7, 8.

KEY RIGHTS AND OBLIGATIONS

MFN and National Treatment. Article 2.1 requires WTO Members to grant MFN and National Treatment to products with respect to technical regulations. Annex 3, the “Code of Good Practice for the Preparation, Adoption and Application of Standards” (“Code”), paragraph D, imposes similar MFN and National Treatment standards with respect to standards.

Unnecessary Obstacles to Trade. Article 2.2 requires Members to ensure that technical regulations “are not prepared, adopted or applied with a view to or with the effect of creating unnecessary ob-

stacles to trade,” and that a technical regulation must not be “more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfillment would create.”

- (1) Legitimate Objectives. Listed examples of legitimate objectives include “protection of human health or safety, animal or plant life or health or the environment.”
- (2) Risk Assessment. Relevant considerations when assessing risks relating to legitimate objectives include scientific and technical information, related processing technology or intended end-uses of products.

Paragraph E of the Code establishes similar, less detailed requirements for standards.

Equivalence Recognition. Article 2.7 obliges Members to give positive consideration to accepting technical regulations of other Members as equivalent. Paragraph H of the Code calls upon standardizing bodies to avoid duplicating or overlapping with the work of other standardizing bodies.

Use of International Standards. Article 2.4 requires Members to base technical regulations upon international standards, except where such international standards would be “ineffective or inappropriate” to achieve the legitimate objective being pursued. Article 2.5 provides that a regulation addressing a legitimate objective expressly listed in Article 2.2 and “in accordance with” relevant international standards is rebuttably presumed not to create an unnecessary obstacle to trade. Paragraph F of the Code imposes a similar obligation for standards.

Transparency of TBT Measures. Article 2.11 requires that all technical regulations be published promptly or otherwise made available in a manner enabling interested parties in other Members to become acquainted with them. Article 2.12 requires Members to allow a reasonable interval between publication and entry into force to allow producers in exporting Members to adapt their products and production methods accordingly. Paragraph O of the Code similarly requires prompt publication of adopted standards. In addition,

Article 10 requires the establishment of an enquiry point to answer “all reasonable enquiries” from other Members and interested parties in other Members, and to provide relevant documents on topics including any proposed or adopted technical regulation or standard.

Member Notice and Comment. If a proposed technical regulation may have a “significant effect on trade of other Members” and a relevant international standard does not exist or the proposed regulation is not in accordance with the content of an international standard, Article 2.9 requires WTO Members to provide other Members a reasonable opportunity to review and comment upon the proposed regulation, and to take these comments into account.

SIGNIFICANT INTERPRETIVE ISSUES

The TBT Agreement has yet to be interpreted in a dispute settlement decision, except for a recent decision interpreting the term “product” to find the measure at issue outside scope of TBT Agreement. *See* WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/R (2000). Various rights and obligations, specific terms and phrases might benefit from clarification. One issue of particular interest from an EH&S perspective is how the MFN and National Treatment obligations under this agreement may be interpreted.

MFN and National Treatment. As discussed above, under the GATT an approach to “like product analysis” has developed that treats EH&S risk as a separate issue to consider under Article XX after determining whether a product is like another product that is being treated differently. However, the TBT Agreement does not incorporate Article XX by reference nor does it include an equivalent provision. As a result, if the GATT like product analysis were imported, it is not clear that an exception equivalent to Article XX would apply to allow a WTO Member to impose, consistent with its MFN and National Treatment obligations, a technical regulation or standard to address an EH&S risk posed by a product that otherwise qualifies as a “like product.”

Other Noteworthy Agreements

There are a number of other MTAs worth noting in light of the manner in which they address significant EH&S issues. Four of them are briefly discussed below.

AGREEMENT ON AGRICULTURE

The Agreement on Agriculture establishes various obligations to promote the reform of trade in agricultural products and related domestic policies. WTO Members have made commitments in the areas of market access, domestic support and export competition, including product-linked agricultural subsidies.

The Agreement recognizes the importance of environmental protection in various ways. Its preamble states that commitments under the reform program should take into account the environment, and Article 20 more generally provides that negotiations regarding these commitments must take into account non-trade concerns, which have been understood to include environmental concerns. Most specifically, Annex 2 of the Agreement lists as subsidies that are not subject to reduction commitments measures relevant to the environment, including certain direct payments to producers and government programs for research and infrastructural efforts under environmental programs.

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SUBSIDIES AGREEMENT")

The Subsidies Agreement essentially identifies three categories of subsidies, based upon their effect on international trade, and provides different types of remedies for each category. "Prohibited" subsidies may not be maintained and allegations that such a subsidy is being provided are subject to an accelerated dispute settlement procedure. "Actionable" subsidies may be granted and maintained, but may also be challenged at the WTO or justify countervailing action if they cause adverse effects to the interest of other Members. "Non-actionable" subsidies are neither subject to challenge nor to countervailing action. Under Article 8.2(c), subsidies of up to twenty percent of the cost of adapting existing facilities to new environmental requirements are considered non-actionable.

GENERAL AGREEMENT ON TRADE IN SERVICES (“GATS”)

GATS establishes a framework of principles and rules to govern trade in services, incorporates specific commitments of WTO Members to liberalize trade in particular service sectors, and provides a mechanism for the negotiation of additional specific commitments.

A general exception clause similar to Article XX of the GATT is included as Article XIV of the GATS, with Article XIV(b) mirroring Article XX(b) (re measures necessary to protect human, animal or plant life or health). In addition, a Ministerial Decision on Trade in Services acknowledges that measures necessary to protect the environment may conflict with provisions of the GATS and raises the question whether any modification of Article XIV(b) may be warranted. The Council on Trade in Services has tasked the CTE to consider this question.

A final noteworthy attribute of GATS is the listing of environmental service sectors on the Service Sector Classification List annexed to the Agreement, which Members may, and a number of Members already have, made commitments to liberalize.

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (“TRIPS AGREEMENT”)

The TRIPS Agreement establishes a common set of rules for protecting and enforcing intellectual property rights. Article 27 of the Agreement defines “patentable subject matter,” and grants Members the right to exclude certain inventions from patentability for EH&S and other public policy purposes.

Article 27(2) allows a Member to exclude from patentability inventions, if prevention of its commercial exploitation is necessary to protect, *inter alia*, human, animal or plant life or health or serious prejudice to the environment.

Article 27(3) allows Members to exclude from patentability “plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.” However, Members must provide for the protection of plant varieties, either by patent, an effective *sui generis* system or a combination of the two. Article 27(3) is currently being evalu-

ated by the WTO membership in accordance with its terms, which called for its review four years after entry into force of the WTO Agreement.

The Dispute Settlement System

AS noted above, one of the most significant results of the Uruguay Round was the adoption of a new, binding dispute resolution process. Through the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), the negotiating governments agreed to replace the existing fundamentally diplomatic process (under which a losing government could simply choose not to agree to the adoption of a dispute resolution decision) with a legal, quasi-judicial regime under which a WTO Member can be compelled to comply with its WTO obligations or face retaliatory suspension of trade concessions and obligations.

Dispute Settlement Process

DISPUTE SETTLEMENT BODY

Article 2 of the DSU establishes a Dispute Settlement Body (“DSB”) to assign panels, oversee the rules of procedure, adopt and monitor the implementation of decisions, and report to other relevant parts of the WTO.

PANEL PROCEDURES

Consultations. Under Article 4, a WTO Member that believes its WTO benefits are being violated by another Member must first request consultations with the offending Member through the DSB. In general, if after 60 days of the request for consultations no settlement has occurred, the complaining Member may request the DSB to form a dispute settlement panel to review the issue. A panel may be formed prior to 60 days if the consulting Members jointly agree that consultations have failed. (Streamlined procedures are available in certain situations of urgency.)

Panel Formation. Under Article 6, unless a consensus of the DSB votes not to form a panel, a Member's request for a panel will be granted. Panels are composed of governmental and non-governmental persons, acting in their personal capacities. Panelists must be free from basic conflicts of interest. Panels will normally be composed of three members, nominated by the WTO Secretariat, subject to the approval of the parties to the dispute. *See* Article 8.

Closed Session. Panels meet in closed sessions. Parties to disputes attend only at the invitation of the panel. No non-governmental participation is allowed. *See* Appendix 3.

Confidentiality. A Party must respect strict confidentiality as to the pleadings and arguments raised by other Parties, unless these other Parties agree to waive confidentiality. *See* Appendix 3.

APPELLATE PROCEDURES

The DSU establishes an appellate review mechanism for panel decisions, using a standing Appellate Body, composed of seven persons. Each appellate panel is made up of three of these seven persons. *See* Article 17.1.

Right of Appeal. Only parties to a dispute, and not third parties, can appeal a panel decision. *See* Article 17.4.

Scope of Review. Appellate review is only available for matters of law covered in the original panel report and legal interpretations made by the original panel. *See* Article 17.6.

Confidentiality. Appellate procedures and pleadings filed in these procedures are confidential. A party may waive its right to confidentiality only as to its own pleadings, and in so doing must protect the arguments of the other parties in the dispute who have not waived their confidentiality. *See* Article 18.

ADOPTION OF PANEL REPORTS

Panel and appellate reports are deemed adopted unless the DSB votes by consensus to block a specific panel or appellate report. In

effect, the winning Member must vote against adoption for a report not to be adopted. *See* Article 14.

IMPLEMENTATION AND ENFORCEMENT OF PANEL REPORTS

Once a report is adopted, the losing Member has an obligation to come into compliance with the WTO rules, or to agree on a mutually acceptable resolution of the dispute with the winning Member. If a losing Member fails to fulfill this requirement, the winning Member can use the streamlined procedures of the DSU to request authorization from the DSB to suspend concessions or other obligations with respect to the losing Member. Such sanctions or suspensions of benefits can only offset the burdens imposed on the winning

Member by the losing Member's violative measure. *See* Article 22.

AVAILABILITY OF PANEL REPORTS

By General Council Decision, panel reports must be derestricted within ten days of circulation to the WTO membership, for release to the public. *See Procedures for the Circulation and Derstriction of WTO Documents*, WT/L/IGO/Rev. 1 (General Council Decision of July 18, 1996).

Significant Interpretive Issues

AMICUS CURIAE BRIEFS

Under Article 13, a panel has the right to seek information and technical advice from any individual or body it deems appropriate. The Appellate Body has interpreted Article 13 to allow a panel not only to seek affirmatively information and advice but also to accept and consider or reject information and advice submitted to it, whether requested or not, including *amicus* briefs. *See, e.g., Shrimp/Turtle*.

Looking Forward

AN array of significant trade and environment issues remain unresolved or subjects of debate. As this discussion reflects, substantive legal questions remain unanswered regarding the interrelationship of WTO rights and obligations with EH&S measures. Important questions relating to the transparency of the WTO system and the role of non-governmental organizations remain open as well, for example regarding public attendance and participation in WTO proceedings and access to documents.

Efforts to address many of these questions through discussion among the WTO membership has helped to clarify the issues, but has not lead to any major decisions regarding the interpretation of the WTO agreements, or to major changes in the day-to-day practices of the WTO (though significant efforts to increase the transparency of the body have been made). The WTO Committee on Trade and Environment ("CTE"), in particular, provides the WTO membership with a forum in which to consider issues concerning the relationship between WTO rules and EH&S measures, and to attempt to develop mutually acceptable solutions. Up until now, however, the Members of the WTO have been unable to agree within the CTE upon compromise solutions. Instead, they have sought clarification, if at all, through the dispute settlement system, which cannot be relied upon to produce interpretations satisfactory to both sides.

The WTO provides Member governments with a mechanism to ensure that overall improvement of economic conditions is accomplished in a manner that will also help improve global EH&S conditions. Perhaps, WTO Members will be more successful at finding common ground in the next Round of trade negotiations than they have been in the CTE.

Labor Standards

MODERATOR: SABINE SCHLEMMER-SCHULTE, THE WORLD BANK

Development Finance, Income Distribution and Worker Rights in the Global Economy

JEROME I. LEVINSON

*Professor, American University, Washington College of Law
Research Associate, Economic Policy Institute, Washington, D.C.*

THE international financial institutions (IFIs),—the World Bank, the International Monetary Fund (IMF), and the three principal regional development banks—have been the principal means by which the wealthier countries collaborate with the less developed member countries of these institutions for the purpose of facilitating the economic and social development of the latter. It should be a noble enterprise. Yet, it is one that for many has turned sour. Responding to that critical environment, the U.S. Congress authorized a Commission to advise it on the future of these institutions. For purposes of the Commission, it included in the definition of IFIs, the World Trade Organization (WTO). The Commission consisted of eleven members, six appointed by the Republican Majority Leaders of the House and Senate and five members appointed by the Democratic Minority Leaders. I was a Democratic appointee to the Commission.

By defining the WTO, for purposes of this Commission, as an IFI, the Congress clearly indicated that the issues of international finance should be considered within a more ample context of trade, investment, and finance considered as a whole. The Majority Report, however, could not break out of the traditional paradigm in which finance is set in a box apart from trade and investment. That report was signed by eight out of the eleven members of the Com-

mission, including two Democratic appointees, Professor Jeffrey Sachs of Harvard University and Richard Huber, former CEO of the Aetna Company.

The Majority Report, is informed by a neo-classical approach in which a free competitive environment is uncontaminated by government regulation or intervention. Within that paradigm, income inequality, core worker rights and the environment are not relevant. They have concocted a scheme that is so implausible, impractical and conceptually unsound that it must fall of its own weight.

With respect to the IMF, the Majority proposal is that only countries which are pre-qualified after a five year transition period, would be eligible for IMF financing; the pre-qualification criteria are financial and fiscal (the fiscal criteria were added as an afterthought after Commissioner Fred Bergsten's trenchant critique in the last meeting of the Commission). The IMF is specifically barred from attaching program conditions to such financing. (During the transition period countries that have not met the pre-qualification criteria would continue to be eligible but only upon paying a steeply penalty rate of interest).

The Majority scheme misunderstands the nature of the problem in many of the developing countries; it is not merely a short-term liquidity crisis that countries face and leads them to the IMF. Very often, the balance of payments crisis is symptomatic of deep divisions within society which prevent coherent economic policy. The crisis is what often precipitates reform, but under the Majority criteria, the country which is not pre-qualified is hung out to dry; the IMF is barred from working out with the country a program that addresses the underlying conditions that led the country to seek IMF assistance. Such a program, in a context of representative political institutions, will often involve political negotiations among the different groups within society. Markets will wish to see a credible program, and performance over a reasonable time, before resuming market access for the country. That will take time, but the Majority proposal assumes an almost automatic resumption of market access.

The premise of the Majority Report is that access to IMF resources is too easily available for member countries, but this is like assuming that people go the dentist for root canal work because they enjoy it. No country willingly goes to the IMF for upper tranche level resources, with its stringent conditionality; rather, precisely

because the conditions are so onerous, countries often wait too long before going to the IMF for assistance. In some countries, admitting the need for IMF assistance can lead to a fall of the government. So, the premise from which the Majority proceeds is fundamentally flawed.

The recommendations with respect to the World Bank are no more plausible. The World Bank is divested of all operations in Latin America or Asia. Development finance in these two regions is devolved upon the regional development banks, the IDB and the Asian Development Bank. The World Bank, or, as the Majority propose, renamed the World Development Association (WDA), becomes a super-development agency for African countries, at least for such time as the African Development Bank is judged not to be capable of assuming responsibility. Under this proposed scheme, the WDA ultimately becomes a source of technical assistance, a research agency for solution of previously insoluble problems, such as tropical diseases afflicting Africa, and a disseminator of best development practices.

Although, the regional development banks in Asia and Latin America are supposed to assume the responsibility for development finance in these regions, the only countries eligible for such financing are those with a per capita income less than \$4, 000 (at \$2,500 per capita income, access to such financing substantially declines), and those without access to capital markets. Financing would be available on a proposed grant basis for infrastructure and poverty reduction; structural adjustment programs would continue to be financed on a loan basis. In Latin America, under this criteria, most of the major countries in the region would be ineligible for development finance. Net repayments by these ineligible countries to the World Bank and the IDB would be in the billions of dollars.

What is being proposed by the Majority is not reform, but demolition of these institutions. The great strength of the World Bank, whatever disagreement may exist over specific policies, is its universal character. It is the one forum where all developing and developed countries discuss development issues related to a concrete issue: development finance. Without that finance, the World Bank becomes another United Nations Development Program (UNDP). It is unrealistic, without development finance, to expect it, as a source of technical assistance, to have the same credibility. Both James Wolfensohn, President of the World Bank, and Ernest Stern,

former Executive- Vice-President of that institution, were explicit on this point. And it is difficult to see why the reformed World Bank is going to be more successful in addressing public health problems and research in Africa than the World Health Organization (WHO).

Similarly, the IDB arose originally as a reaction to the World Bank priorities. That difference, to a very large extent, no longer exists. On a regional level, however, the IDB is a truly regional development finance institution. Without that function, for the great majority of its countries, it loses its reason for being. Like the World Bank, politically, and realistically, it will increasingly become irrelevant for the region. The IDB cannot survive as the truncated organization proposed by the Majority.

The Majority does not believe in the legitimacy of development finance. For them, there is no difference between development and commercial financing. Hence, if a country has access to the private financial markets, there is no basis for its continued access to the development banks for development finance. I believe this is a mistaken view. Development finance is fundamentally different from commercial bank financing. Mr. Wolfensohn testified from his own personal experience as to the difference between the two:

When we go in from the [World] Bank we go in on the basis of trying to look at what's happening to the country and what's happening to the people in the country and what's happening to social stability and what's happening on issues like governance, on openness of financial systems... Can you imagine the head of Goldman Sachs or Merrill competing for business, going in and talking to them about whether they should have a bigger education program?

Moreover, access to the financial markets, over the past twenty five years, has been highly volatile. The development banks provide a reliable source of financing for high value projects and programs, particularly for human capital investment in health, education and technology related programs and projects. In times of financial crisis such financing becomes particularly invaluable. For example, in Brazil, in 1998, the IDB coupled its financing related to the then financial crisis, with a commitment by the Brazilian government, in contrast with past practice, to maintain an agreed level of investment in the education and health sectors.

For the Latin American region, the combined level of financing for the World Bank and the IDB, is approximately \$15 billion; with counterpart financing from the borrowers, the region then has an assured level of long term development finance for high value human and physical infrastructure investment of approximately \$30 billion. To maintain this level of financing, no further increase in resources from the shareholders is necessary; it can be financed from repayments of existing loans in a kind of revolving loan fund. Yet, the Majority proposes to abandon this self financing mechanism and substitute for it grant financing, which is subject to the fiscal and political uncertainties of member governments.

In sum, the Majority report recommendations with respect to the World Bank and the IMF are both implausible and impractical. However, there remain major doubts about the World Bank approach to development strategy. The Bank states that its primary concern is reducing poverty, and, to a lesser extent, income inequality. Nancy Birdsall, the former Executive Vice President of the IDB, however, observes that in Latin America, poverty and income inequality have continued to increase in the decade of the 90's, a decade in which growth has resumed, and the Latin American countries have been the most zealous in implementing the reforms advocated by the World Bank and the IMF. (Birdsall). The recently published World Development Report, 2000/1, *Attacking Poverty* (WDR, 2000/1) confirms these tendencies.

In my view, this is not merely coincidental. It is in part a consequence of the policy priorities of the World Bank which, above all other considerations, seeks to assure the mobility and security of capital. It consequently, uncritically, supports the privatization of state owned enterprises; it intervenes in the labor markets to demand labor market flexibility measures that are designed to make it easier to fire workers and weaken unions for the purpose of driving down wages and benefits to make a country's goods more competitive in international markets.

In Latin America, the intervention of the state in capital intensive industries, originally, was intended to avoid dominance of those sectors by a traditional oligarchy and multinational corporations (MNCs). It was intended to create a countervailing power within society to a concentration of economic power in private monopolies and oligopolies. In time, many of these state owned enterprises themselves became a privileged sector of the economy. But the

privatization of these same enterprises, under any and all circumstances, often at distress prices, has served to increase the concentration of power which their creation was intended to avoid: the only ones capable of purchasing such assets are those same powerful private companies, domestic and foreign.

The labor market flexibility measures, simultaneously promoted by the Bretton Woods institutions, weakens one of the few remaining institutions, free trade unions, that could provide some countervailing power to that of the domestic monopolies and oligopolies, and the MNCs, that once preoccupied Latin American policymakers. Joseph Stiglitz, former Chief Economist of the World Bank, notes that during his time at the Bank, labor market issues did arise, but all too frequently, mainly from a narrow economics focus, and, even, then, looked at even more narrowly through the lens of neo-classical economics; a standard message was to increase labor market flexibility—the not so subtle subtext was to lower wages and lay off unneeded workers. (Stiglitz).

In the year 2000, the World Bank cannot bring itself to support the most important core worker rights of all: freedom of association and collective bargaining: Empirical evidence on the economic benefits of unionization and collective bargaining is generally quite mixed and suggests that both costs and benefits are complex and context specific. (WDR, 2000/1, p. 73). In contrast, labor market flexibility measures, in the Bank's view, are clearly positive for employment and development. (WDR 1995). This view is not shared by the International Labor Organization (ILO), which finds no such correlation between labor market flexibility and positive employment policy. (World Employment, 1996/97, pp. 187-8). These conclusions by the World Bank lead it to deem freedom of association and collective bargaining, but not labor market flexibility measures, to be political, thereby contravening the provision of the Bank's Charter that prohibits the Bank from taking political factors into account in its decisions. (Aidt et al., Holzmann).

I am frank to say that I find bizarre the reasoning on the part of Bank officials, and Bank commissioned studies, which support this double-standard. It appears to be based more on the neo-classical prism, to which Stiglitz refers, through which the Bank views labor market — and, more generally, development policy — issues. Harry Dexter White and Lord John Maynard Keynes, the drafters of the charters of the World Bank and IMF, designed those institutions for

the purpose of countering that neo-classical economic ideology. White and Keynes, respectively, were closely associated with the New Deal in the United States, and, in the United Kingdom, with the Labor Party. They must be turning over in their graves at the way in which interpretation of the Bank's Charter has been distorted to reflect that ideology with respect to freedom of association and collective bargaining.

Explaining the prolonged and bitter strike over seemingly modest tuition increases at the National University in Mexico City, Julia Preston, observes:

... the student strikers were also a product of globalization... The government has stimulated growth by restraining inflation, mainly by depressing workers' wages. Official figures show that the minimum wage today buys 48 percent of what it did in 1982. So, while export enclaves have thrived, workers have been drawn into a spiral of downward mobility... [I]n today's increasingly impoverished urban working class, even small tuition costs can break a family. (Preston).

We are in the process of creating not only in Mexico but elsewhere in the Hemisphere, in East Asia, and in the United States itself, an increasingly embittered and alienated urban working class that sees, in the name of globalization, its former aspirations for social mobility for itself, and more importantly, its children, increasingly frustrated. And that frustration sets the stage for a political reaction that can put in peril the institutions of democracy.

If I had to sum up the problem in a word, it would be balance: there is no balance in the Congressional Commission Majority report; there is no balance in the WTO and North American Free Trade Agreement; there is no balance in a two track international trade, investment and finance regime in which there is a rule based system for the protection of corporate property rights, but no protection for core worker rights. There is no balance in a World Bank/IMF neo-classical ideology that endorses labor market flexibility measures intended to weaken unions, lower wages and benefits, and deny the core worker rights of freedom of association and collective bargaining, all of which contributes to growing income inequality.

In Chile, President Lagos champions a view that says, A it is possible to fight the region's gravest problem—gross income dis-

parities between the wealthy and vast under-classes—without violence and within the confines of the free markets and parliamentary democracies established over the last two decades. (Faiola). That is the same view expressed by President John F. Kennedy forty years ago when he announced the ambitious Alliance for Progress program for the Latin American region. It is a telling comment on all of us that forty years later, President Lagos is still describing the region's gravest problem as diminishing the gross income disparities between the wealthy and vast underclass.

The development strategy being pursued by these institutions cannot be reconciled with the larger view of a just society expressed by President Lagos. Without a change in policy priorities by the World Bank and IMF, which addresses not just the problem of reducing absolute poverty, but, as well, growing levels of income inequality, I predict support for these institutions will wither away within this country. In this respect, it is disappointing to see the degree to which the income inequality issue has been diluted in the final version of WDR 2000/1.

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“Trade and ...” Where do we go?

PRADEEP S. MEHTA

Secretary General

Consumer Unity and Trust Society (CUTS)

Executive Summary

THIS paper outlines the work which CUTS is engaged in the context of Linkages between trade and labour standards, and trade and environment. Soon this agenda will be lengthened due to newer concerns being pushed by the North. It speaks about the inequities of pushing for non-trade concerns into the trade regime and also about the myths and realities on the ground.

In order to deal with the issues in a dispassionate way, research and evidence-based dialogue is being proposed on the usual charges which are being made against the South. CUTS hopes that through this project much of the heat and tension will subside so that one can actually address the problems, and find solutions.

About CUTS

ESTABLISHED in 1983, Consumer Unity & Trust Society (CUTS) grew out of a rural development communication initiative in Rajasthan, a state in north-west India. It is now the largest consumer group in India, and an active member of Consumers Interna-

tional (CI), working at the grassroot, regional and international levels by pursuing social justice and economic equity within a across borders.

It is represented in several Government of India policy bodies: The Central Consumer Protection Council, the Technical Committee on Ecomark, the National Road Safety Council and the National Advisory Council on International Trade and the National Codex Committee. Internationally, CUTS serves as a member of the CI's Global Policy and Campaign's Committee on Economic Issues, and site on the board of the International Centre for Trade and Sustainable Development, Geneva, and the South Asia Watch on Trade, Economic & Environment, Kathmandu.

CUTS Centre for International Trade, Economics and Environment

D-217, Bhaskar Marg, Bani Park, Jaipur, 302016, India

Ph.: 91-141-20 7482-84, Fax: 91-141-20 7486/20 2968

Email: cutsjpr@jp1.dot.net.in Website: www.cuts-india.org

Introduction

THIS presentation is about our work in the area of "Trade and ...". Before the Seattle ministerial meeting, CUTS hosted and organised a Third World Intellectuals and NGOs Statement Against Linkages (TWIN-SAL) under the leadership of Professor Jagdish Bhagwati, who is also the chairman of our international advisory board.

The purpose of this statement was to mobilise opinion against the strident demand for linking trade with labour standards and with environment standards. It was quite controversial and a debate was launched. This debate continues to occupy the proscenium. One of the fears that we had expressed is that the trade agenda should not be contaminated with non-trade issues, as it would not help either of the agendae. We then and even today protest against the inclusion of the Trade-Related Intellectual Property Rights (TRIPs) agreement as being inconsistent with the main goals of the World Trade Organization (WTO) i.e. trade liberalisation. We also argued that because this is there, it does not mean that we can bring in anything and everything through the prefix: 'trade-related'.

When the Singapore ministerial meeting came up with a declaration covering future work in the area such as investment policy and competition policy, we revised the name of the WTO as the WEO (World Economic Organization). One of the reasons for the collapse of the Seattle ministerial meeting was the last minute demand by the US to link trade with labour standards. Developing countries were totally opposed to this, because of the sheer potential of it being misused as a protectionist device.

The latest salvo to be fired by the European Union is to link animal welfare with trade in the agreement on agriculture. (The EU has cleverly killed two birds with one stone. Firstly, it will satisfy its animal welfare lobbies, who have been asking for it. Secondly, it will continue to muddle the agricultural negotiations, as it has been dragging its feet on it). We have been waiting for it to happen. In future gender, and human rights activists will also push for linking trade with their concerns. Thus the WTO will perhaps become the WESO i.e. World Economic and Social Organization. We already have the Economic and Social Council under the United Nations so what is there is enough precedence to change its name, character and scope. Further non-trade issues likely to be demanded for being linked could be good governance and what have you! So us poor sods in the South can look forward to a very bright future.

No one will address the linkages between trade and poverty, even though the OECD has a target of reducing world's poverty by half by 2015. One of the major problems with poverty reduction is the unfair terms of trade in the WTO, and that is not being addressed at all. Another major problem, especially for the least developed countries, is the mounting burden of external debt. The OECD countries do make noises on these issues from time to time, but when it comes to action, one sees very little of it.

On the other hand, the issue of linking trade with either labour standards or with environmental standards has been occupying the centre stage ever since the World Trade Organization came into being in 1994. It has further divided the rich North and the poor South. The tragedy is compounded by the fact that it is a one-way street i.e. the rich North is the demandeur and the poor South, the defender. Inherently it is inequitable because the South cannot invoke any such ground to propose or justify trade measures, sheerly because it cannot afford to. It needs trade and investment to achieve economic growth, create more jobs and get their people out of poverty.

The polarisation on the grounds of linkage was worsened by the US president, when he proposed the introduction of labour standards into the WTO and empowering it with the power of sanctions. This was one of the main causes of the failure of the Seattle ministerial meeting in November 1999.

Even in the run up to the Seattle meeting much storm was raised by several interest groups to push for getting both labour and environment standards into the sanction-based WTO system. It was these two issues on which there was complete unity among the poor developing world. They were otherwise divided on other new issues like multilateral rules for investment, and for competition policy, with various poor countries having different positions.

One has to take stock of the past to see how the international community can proceed in the future, that being the theme of this conference. Indeed the failure of the Seattle talks is ominous for the poor South too, only one factor is unnerving that of uncertainty. But progress cannot be achieved if the major trading powers such as the EU really want to move forward on their existing commitments without wanting to seek new concessions from the South. However, the signs are not positive towards this end.

CUTS Campaign: TWIN SAL

IN March 2000, EU's trade commissioner, Pascal Lamy visited India in order to lobby her to move forward on the pending round of talks. From his speeches and comments, it did not appear that the EU would like to engage with India or other developing countries on the bones of contention, which caused the failure of the Seattle talks. On the contrary, it would drag its feet on agriculture and, as I said above, newer issues are being added, such as animal welfare.

Reverting to Seattle, in the run up, as a counter campaign, though not quite matching with the level of the noise raised by the trade unions and civil society in the USA, CUTS organised and circulated a statement opposing such linkages. Third World Intellectuals and NGOs Statement Against Linkages (TWIN-SAL) was mainly drafted by the noted trade theorist Professor Jagdish Bhagwati. He is also the chairman of the CUTS' advisory board. TWIN-SAL was

endorsed by over 100 individuals from all over the world. In this it was argued that:

- Overloading the WTO with non-trade issues that are not the concern of the GATT agenda would distort and strain the multilateral trading system.
- Such issues smell of protectionism actuated by competitiveness concerns.
- There are genuine concerns too but the agenda continues to be contaminated by competitiveness concerns.
- There are specialised agencies to deal with these issues such as ILO or the UNEP, which should be empowered to deal with violations of international agreed standards.
- Such moves will weaken these specialised international agencies and strengthen the opaque WTO.
- The basic issue is that of development and poverty eradication without which it would be difficult to implement high standards by the poor countries.

Dialogues Launched

THE statement attracted huge attention widely, in the media as well as strong responses from the protagonists and the antagonists. Following this, CUTS organised a panel discussion at Seattle on the sidelines of the ministerial meeting. A special Linkages issue of the CUTS flagship periodical: *Economiquity* was also published as a Backgrounder for this panel discussion. In this edition, the TWIN-SAL was carried along with a Counter Statement by ICFTU, among other comments on the issue of Linkage. Three important points emerged at this meeting:

- A sanctions-based approach will not help progress the agenda.

- Environment and labour standards are two different cups of tea and should not be mixed together.
- Dialogue needs to be continued to resolve the conflicts between the two sides and create better mutual understanding.

Another panel discussion was organised at Bangkok on the sidelines of the UNCTAD X in February 2000. This too came up with similar recommendations. At both panels, we ensured that there is a balance of speakers i.e. holding dissenting views. Interestingly at both meetings where over 70 persons attended, some people had to stand which indicated the deep interest in the issue. Two interesting remarks are worth reporting here.

Mr. G. Rajasekan, representative of the Malaysian Trade Union Congress, which is affiliated to the ICFTU the main protagonists of a social clause in the WTO, was somewhat nuanced in terms of who will have the power of sanctions. His view was that if the WTO decides that there is a violation of labour standards then it should be the ILO which should have the ultimate power of imposing the sanctions. (Privately, Mr. Rajasekan, mentioned that their union has advised ICFTU to soften their stand as it is antagonising developing countries. In fact, the ICFTU member unions in India: Indian National Trade Union Congress and Hind Mazdoor Sabha have already disassociated themselves from the ICFTU's stand).

Mr. George Sebastian of the International Fisherfolks Collective pointed out that adolescent tuna is now being increasingly caught as dolphins do not swim along with them. This is by itself an ecological disaster. Secondly in the case of fishermen, the young have to be initiated into the trade so that they can overcome the sea sickness. Adults cannot be trained to combat sea sickness.

A third panel was organised at Geneva on June 2000 with human rights groups on the sidelines of the Social Summit +5. Natively, the speaker: Peter Prove of the Lutheran World Federation accused trade negotiators of being ignorant about the UN conventions on human rights which have signed by governments. It was pointed out that trade diplomats cannot even deal with their own agenda, and therefore to expect them to be aware of all commitments made by governments is a very tall order.

Chair of the panel, Tony Hill of the UNGLS, expressed his regret that this issue has pitted worker against worker and people

against people. Therefore there is an urgent need to close the conflicts. According to him such kind of dialogues are very crucial in this effort.

Trade union representatives who had confirmed their participation did not show up. However a representative of the Organization for African Trade Union Unity did participate, and expressed his organization's stand as being against Linkages between Trade and Labour Standards.

Myths and Realities, and Facts and Counterfactuals

TRADE unions also, often, rely upon myths, which get compounded when they continue to drum them. For example, in the above referred ICFTU's counter statement published in our special edition of *Economiquity* on Linkages, it is said that:

"The workers who are most hit by India's failure to address child labour in its carpet sector are the exporters in Nepal who are striving to make carpets under good working conditions".

Fact is that the problem of child labour is endemic to both India and Nepal, because of poverty. It is a bogey that Nepal's exporters are suffering. On the contrary Nepal's exports of carpets is steadily increasing over time.

"Those who are most affected by the suppression of trade union rights in Indonesia's coal mines are the coal miners in India, whose strong trade unions obtain decent wages for them which are then undercut by imports from Indonesia".

Fact is that all coal mines in India are in the public sector and the labour gets very high wages even if they don't produce! Secondly, coal is imported from Indonesia, not because of low prices, but because of low ash content, while the Indian coal is very polluting and harmful for thermal power stations. The Indonesian coal is costlier when landed in India.

"The whole developing world suffers from China's violation of all the core labour standards, enabling it to act as a magnet to persuade multinational companies to uproot their production from other developing countries in order to produce at low labour cost in China's special economic zones".

Fact is that companies are investing in China not because of low labour standards, but because of low labour costs. This is due to a lower cost of living. Furthermore there is no evidence of a plant shifting from any developing country to China because of this factor.

Quite often child labour is a vocational issue or part of the family work at home. For example, the US recently banned the import of biris (Indian leaf-rolled cigarettes) from a town in South India (Nagercoil) because their customs inspectors saw children rolling them, in their own houses.

Fact is that the biri manufacturer actually supplies tobacco, dried leaves and thread to make the biris at home, which is rolled by the whole family and then roasted. So children of the poor, also put in their mite at home.

In reaction to the EU's proposal to label cigarettes that "Smoking kills", the German tobacco workers' union protested that the same rule should not apply to cigarettes meant for exports, because 11,000 jobs will be adversely affected.

Double standards: Is it alright that one should do unto others, what they will not do unto themselves?

Non-Trade Issues Do Not Help Global Welfare

THERE is a natural bias in the manner that we have approached the issue. Because we firmly believe that this whole push—linking trade with extraneous factors—does not help global welfare. On the contrary it will only help a few in the rich world. For example when the Uruguay Round concluded we got two new agreements through the 'trade-related' prefix. The first, on intellectual property rights (TRIPs) is in fact quite against the spirit of the whole WTO. The raison d'être of the WTO is trade liberalisation, while TRIPs is about trade restriction and benefiting few of the intellectual property rights owners, even if they are pirates. Not only that it grants a 20 year protection period to patent holders, which beats any sane economist's common sense.

The other trade-unrelated agreement is on Trade Related Investment Measures (TRIMs), which requires poor countries to abandon any kind of conditionalities on foreign investors even at the cost of

their own development priorities. These are local content requirements or export commitments by the foreign investor which will enable the host country's economic development.

The funny part of both these out of place agreements is that poor countries have been provided transition periods of five years to come up to the standards prevailing in the rich countries. No magician can pull a poor country out of its level of development in five years. The question, which arises, is whether Bangladesh can become Britain in 5 years.

In my opinion TRIPs should be amended and sent to WIPO, or aborted, while TRIMs should be dissolved entirely. After all entrepreneurship is about taking risks.

Be that as it may, let's revert to the subject of linkages between trade and labour standards and trade and environment standards. While fully respecting, supporting and demanding the need for better regulation domestically, handing over the powers to a supra national authority is fraught with dangers. It is not a rule on how trade needs to be conducted. Even under the present rules-based dispute settlement system, it is the powerful who dominate the show. Many a times poor countries do not even have the resources to either understand the issue or to raise it at the dispute settlement body.

CUTS Project on Linkages

WE have drawn up a global project to research and disseminate information on these two issues. The project proposal outlines a programme that needs to be undertaken to build capacities of civil society and policy makers, especially in the North, vis-à-vis appreciating the complex socio-economic issues that are currently not reflected in the ongoing debate on 'linkages'.

The focus of this programme is to facilitate effective evidence-based dialogue in order to help both the camps of the 'linkages' debate to understand each others' positions better. The goal is to reduce the heat and tension with the hope that the problems are addressed in the right manner leading to betterment of the situation i.e. good social standards and protection of the environment. We believe, that this programme has the potential of:

- Resolving the conflicts arising out of the contentious discussions of incorporating labour standards or environmental standards into the multilateral trading system i.e. a sanction-based platform viz the World Trade Organization (WTO).
- Strengthening the existing non-sanction based institutions at both the national and international levels for effectively tackling the multifarious dimensions associated with these issues, and thus arriving at sustainable development solutions.

The project would promote dialogue with parties on all sides so as to reduce the tensions and resolve conflicts. For example, the RIIA has also tentatively agreed to host a dialogue under these hallowed portals, provided money can be raised. The research agenda has been divided into two axes. The first is on trade and labour standards and the second on trade and environment standards. These are being reproduced here as drafts for comments and inputs from all quarters.

A common element of both the axes is the studies on Willingness To Pay by the Consumer in the North if the goods have been produced by maintaining the best standards of labour and environment. It has been argued by some scholars that consumers would be willing to pay more for such goods, but one is not too sure. One study in Pakistan by the Sustainable Development Policy Institute, Islamabad showed that of the US\$10 which a consumer pays for a T-Shirt in USA, the exporter gets only US\$1, while the poor cotton farmer gets a share of only \$0.09 i.e. less than a dime. In a similar situation a US cotton farmer would get at least US\$1.00. Under these circumstances how will the Pakistani farmer produce cotton without using excessive chemicals and water or not employ children to work in the fields for picking cotton and such light activities.

The Linkage between Trade and Labour Standards

CORE LABOUR STANDARDS

The Issues

- Core labour standards are not being implemented properly in developing countries, which give them a competitive advantage in exports.
- Linking trade and labour standards into the WTO framework has the potential of being used as a protectionist device against exports from poor to rich countries.
- The monitoring mechanism in the ILO is inadequate for ensuring compliance of a country's obligations under the ILO Conventions.
- Worker productivity varies from country to country.
- Labour markets are inflexible in the North and the immigration laws act as a barrier to movement of labour.
- Trade unions in the world and countries are divided over the issue of linking labour standards with trade, and where there is consensus it is nuanced.

The Questions

- What is the sanctity of the core labour standards? Whether there is a clear link between trade and labour standards?
- Do the developing countries deliberately suppress/flout the labour standards for gaining competitive advantage in trade? Can ratification of ILO conventions alone solve the problem?
- Is the labour standards issue a part of the campaign aimed at protecting the uncompetitive industries in the North?
- Is there any evidence to show that labour standards have any relationship with exports?

- Should productivity be a part of the discussion while examining the issue of labour standards?
- Is there any evidence that depressed wages of labour in developed countries is due to cheap imports from South?
- Whether workers' rights in both developed and developing countries are based on the core labour standards?

CHILD LABOUR

The Issues

- Economic compulsion (poverty) forces children to work rather than go to school.
- Differential/lower wage levels exist for child labour as compared to adult labour.
- While children are abused in the poor countries by making them work etc., in rich countries children are victims of negligence and social disarray caused by an increasing consumer culture.
- In many occupations such as gem cutting or fisheries or agriculture vocational training starts at an early age.

The Questions

- Whether trade sanctions would help eradicate child labour?
- What will be the cost for such eradication in different countries?
- Whether eradication would lead to higher costs thereby affecting competitiveness of products from these industries?
- Whether children would get decent work in a poor country when they have grown up as educated persons?
- Whether children's rights are being protected in all countries?

POLICY RESPONSES AND EFFECTIVENESS**The Issues**

- Labour standards are poorly implemented.
- Consumers in the rich countries have boycotted goods exported from poor countries, which were allegedly made by exploited/abused labour.
- Other than boycott, there are other initiatives for fair trading, codes of conduct etc., which are brought to bear on developing country suppliers as well as the well known companies in the North.
- GSP benefits for observance of labour standards can and are often misused for political reasons.

The Questions

- Where does the problem lie with regard to labour issues in developing countries?
- Does the issue of labour standards reflect the concern of the labour force in the non-export sector also?
- Is the international community concerned about the poor labour standards only in some countries, which compete with them in the market, but not in the oil exporting countries?
- In view of reducing tariff levels would any GSP benefits be meaningful?
- Are fair trade schemes and codes of conduct developed with inputs and active participation from developing countries?

The Linkage between Trade and Environment

MEAs, TRADE AND DEVELOPMENT

The Issues

- Negotiations on MEAs before the formation of the WTO have been carried out in isolation to trade regulations
- The logjam in the WTO Committee on Trade and Environment (CTE) is preventing progress on addressing concerns being expressed by free traders as well as environmental and developmental activists
- The Dispute Settlement Body of the WTO, which is resolving disputes in the area of trade and environment, is adjudicating on issues without a holistic approach to the overall development considerations
- Implementation of MEAs with a special emphasis on transfer of resources of all kinds.

The Questions

- Which MEAs have trade and development clauses/options?
- Which trade rules or agreements contain environment/development clauses?
- Can any political solutions be suggested to break the logjam at the CTE?
- How can the proceedings before the DSB on issues pertaining trade and environment be made more development centric?
- Can the impact of implementation of MEAs on sustainable development of developing countries be quantified?

DPGs, TRANSFER OF TECHNOLOGY, TOXIC WASTE TRADE**The Issues**NIMBY syndrome

- Tighter regulation, more so, in developed countries, is leading to the dumping of such substances and technologies world-wide
- Dirty and outdated technologies are generally tied with the FDI entering countries or to the aid that countries receive

WIMBY syndrome

- High costs associated with inventing new technologies force host countries to accept outdated technologies that suit their demand for the time being
- Ignorance about the existence of new cost efficient and environment friendly technologies are an important factor for the entry of old and dirty technologies
- At times developing and poor countries have to accept FDI in the form of dirty industries to address employment problems
- Cost of regulation, lack of transparency are important factors that hurdle poor countries to implement environment regulations effectively.

The Questions

- Are tighter regulations 'the' factor that push industries to shift their activities associated with DPG *et al* to countries where weak enforcement prevails?
- Is old technology necessarily dirty or is an effort made to create such a perception? Are social aspects associated with these technologies considered while labelling them as outdated?

- What are the DPGs that are sold to poor countries and do they cluster in certain sectors?
- Would the TRIPs Agreement escalate costs associated with environment friendly technologies, thereby compelling poor countries to keep on accepting dirty technologies that suit their demand?
- How important are lower regulations in pulling industries to establish their activities associated with DPG *et al* in countries where weak enforcement prevails?
- What is the process by which a domestic good is banned and what convergence is there in these processes between countries?

SUSTAINABLE PRODUCTION AND CONSUMPTION

The Issues

- The South is being expected to adopt production standards of the North without having adequate resources of all forms to implement the same
- Standards pertaining to sustainable consumption and production that suit consumption and production patterns of the North are being popularised and thrust on the South.
- Political, economic and social conditions are important ingredients that decide whether production and consumption standards followed by a particular region are sustainable or not
- Lack of effective participation of developing countries in standard setting bodies does not allow them to influence discussions on these issues
- Policy effectiveness vis-à-vis existing policies is a big hurdle countries face in implementing standards.

The Questions

- How standards are evolved and determined? What is the level of participation by developing countries in this process?
- Do not the social, economic and political conditions of a region determine the standards?
- Would products from the South be competitive after implementing production standards that have been decided by the North?
- What are the difficulties that poor countries face while implementing policies in the area of sustainable consumption and production?

TARIFF ESCALATION AND PEAKS

The Issues

- Tariff escalation acts as a tax on development by discriminating against developing countries' processed goods.
- Similarly, tariff peaks operate in many areas of interest to developing countries, particularly agricultural products, thereby leading to unsustainable use of resources in developed world.
- Tariffs, as well as the rate of tariff escalation, have been reduced in the Uruguay Round, but is still a problem for developing country exports.
- Possible environmental effects include: increased transport costs, misallocation of resources, leading to wasteful production, poor technology usage delaying adoption of greener technology and hampers industrialisation in developing countries.

The Questions

- To what extent does tariff escalation and tariff peaks distort trade flows and therefore the allocation of resources.
- What effects does this have on development and what are the environmental effects.

Conclusion

IN conclusion, we hope that the above drawn out research programme will not only throw some light on the vexed issues but also trigger more in depth research by scholars for a deeper and better understanding of the issues. We are inviting comments as well as offers for partnerships to conduct dialogue, and appeal to donors to support our research and advocacy efforts. We feel it is extremely essential to address these issues in a dispassionate manner, otherwise inequities on the poor South will continue.

As it is the South is struggling with the burden of implementing various complex WTO accords, while the North is hardly sympathetic to its problems. Poverty coupled with unfair terms of trade are also important factors which are worsening the problems.

In conclusion, let it be reiterated, that we in the South are equally interested in protecting our environment and our workers' rights. The forced coupling of the wagon of linkage issues with the trade engine have unfortunate repercussions and diverts the attention domestically. As it is, much of our sovereignty has already been surrendered to a supra national authority and then expect that social and environmental standards will also be determined by an authority, which is not under the control of domestic parliaments, is asking for too much.

Thank you!

Export Subsidies and Anti-dumping

How Can Developing Countries Respond to the WTO Anti-dumping and Countervailing Subsidies Rules - Compliance Based on Limited Resources, Becoming Users Themselves, or Other Options?

MODERATOR: YING WHITE, THE WORLD BANK

WTO Agreement on Subsidies and Countervailing Measures

JOHN D. MCINERNEY¹

*Chief Counsel for Import Administration (Acting)
U.S. Department of Commerce*

IT should first be noted that the overall structure of the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”) is different from that of the WTO Anti-dumping Agreement (“AD Agreement”). The AD Agreement provides a set of disciplines that govern the unilateral application of anti-dumping remedies by WTO Members. The SCM Agreement similarly provides a set of disciplines governing the unilateral application of countervailing duties by WTO Members to subsidized exports. However, the SCM Agreement also provides direct remedies for certain subsidies in the multilateral forum of the WTO.

The WTO SCM Agreement

Definition of a Subsidy.

The Agreement defines a subsidy as consisting of the two components: a financial contribution and a benefit.

¹ The views expressed in this paper are those of the author alone and do not necessarily represent the positions of the Department of Commerce or the U.S. Government.

FINANCIAL CONTRIBUTION

This is simply the transfer of value from a government to a recipient.² Examples would include an outright grant or debt forgiveness, an equity infusion, or a loan. The SCM Agreement makes clear that the financial contribution could be indirect (for example, through a private entity) as well as direct. A financial contribution can be thought of as the vehicle by which a benefit may be transferred.

BENEFIT

This term is not defined in the SCM Agreement, but the WTO Appellate Body has ruled that benefits are measured in terms of the “benefit to the recipient,” rather than the “cost to the granting government.”³ Generally speaking, the “benefit” is the difference be-

² Article 1.1 of the WTO SCM Agreement provides that a subsidy shall be deemed to exist if:

- (a)(1) *there is a financial contribution by a government or any public body within the territory of a Member (hereinafter referred to as “government”), i.e., where:*
 - (i) *government practice involves a direct transfer of funds (e.g., grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g., loan guarantees);*
 - (ii) *government revenue that is otherwise due, is foregone or not collected (e.g., fiscal incentives such as tax credits);*
 - (iii) *a government provides goods or services other than general infrastructure, or purchases goods;*
 - (iv) *a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or*
- (a)(2) *there is any form of income or price support in the sense of Article XVI of the GATT 1994; and*
- (b) *a benefit is thereby conferred.*

³ Report of the Appellate Body in *Canada - Aircraft*, WT/DS70/AB/R, adopted 20 August 1999. The distinction between “cost to the government” and “benefit to the recipient” may be grasped most readily by considering a situation in which the commercial rate of interest is 8%, the government may borrow at 6%, and the government provides a loan to a company at 5%. In this situation, the cost to the government is only the difference between the government’s cost of funds (6%) and what the government receives (5%), or 1%. The benefit to the recipient, however, is the difference between what the recipient would have had to pay on the commercial market (8%) and what it actually paid to the government (5%), or 3%.

tween what the recipient pays for the financial contribution and the market value of that financial contribution.⁴

SPECIFICITY

Subsidies become “actionable” under the SCM Agreement or “countervailable” under the Members’ domestic laws only if they are “specific.” “Specificity” refers to the distribution of benefits.⁵ If a benefit is very widely distributed (such as schools, roads, electrical power, and broad tax-deductions) it generally is not considered to be specific. On the other hand, if a benefit is conferred on a

⁴ The meaning of “benefit” is also indicated by Article 14 of the SCM Agreement, which provides guidelines for measuring different types of benefits. For example, the benefit inherent in a preferential loan is the difference between the total interest due on the loan and the total interest that would be due on a comparable commercial loan.

⁵ Article 2.1 of the WTO SCM Agreement provides that the following principles apply in determining specificity:

- (a) *Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.*
- (b) *Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.*
- (c) *If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b) above, there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.*

Article 2.2 adds that: “A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority will be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this SCM Agreement.”

particular company, industry, or sector (such as a \$1 billion grant to a particular steel company), that subsidy is considered to be specific. The reason why only specific subsidies are actionable is that specific subsidies are considered to distort production and trade in the sectors upon which they are bestowed, while the effects of general subsidies are considered to be too diffuse to distort trade in specific sectors. As discussed below, export subsidies are treated as specific, *per se*.

Domestic Subsidies VS Export Subsidies

Article 3 of the SCM Agreement prohibits “subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance”⁶ Export subsidies are prohibited outright because they are considered to cause more direct and immediate distortions to trade than domestic subsidies.

Questions about what, precisely, renders a subsidy an export subsidy have centered on two issues: (1) whether nominally domestic subsidies to export-oriented industries should be treated as contingent *in fact* upon export performance and therefore treated as export subsidies; and (2) whether the listing of export performance as one of a set of loose criteria for granting subsidies renders a subsidy an export subsidy.

The WTO “Traffic Light” Regime - Red, Yellow, and Green Subsidies

The SCM Agreement divides subsidies into three broad categories: prohibited (so-called “red light”) subsidies; non-prohibited, but actionable (so-called “yellow light”) subsidies; and permissible (so-called “green light” subsidies). The categories work as follows:

⁶Footnote 4 to Article 3.1(a) provides that: “This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is accorded to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.”

PROHIBITED (“RED LIGHT”) SUBSIDIES

Article 3 of the SCM Agreement prohibits export subsidies and import substitution subsidies. Export subsidies were explained above. Import substitution subsidies are those that are contingent upon on the use in production of domestic, rather than imported, inputs.⁷ Prohibited subsidies are deemed to cause injury or adverse trade effects, *per se*. Article 4 of the SCM Agreement renders prohibited subsidies directly actionable in the WTO.⁸

NON-PROHIBITED, BUT ACTIONABLE (“YELLOW LIGHT”), SUBSIDIES

Unlike “red light” subsidies, these subsidies are not prohibited. However, where they cause “adverse effects” to another Member, they become actionable in the WTO and may be actionable (“countervailable”) under Member’s domestic legislation.⁹

The SCM Agreement provides that certain non-prohibited subsidies, such as those exceeding 5% or those granted to cover operating losses, cause “serious prejudice” (and, therefore, “adverse effects”) *per se*.¹⁰ Such subsidies are referred to as “**dark amber**” subsidies. These subsidies presumptively are actionable under the WTO. However, a Member granting a dark amber subsidy has an opportunity to rebut the presumption of serious prejudice.¹¹

NON-ACTIONABLE (“GREEN LIGHT”) SUBSIDIES

These subsidies not only are *not* actionable in the WTO, but also are exempt from countervailing measures under the Members’ do-

⁷ See Article 3.1(b) of the SCM Agreement.

⁸ Article 4.7 of the SCM Agreement provides that: “If the measure in question is found to be a prohibited subsidy, the Panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the Panel shall specify in its recommendation the time period within which the measure must be withdrawn.”

⁹ Article 5 of the SCM Agreement. The existence of “adverse effects” must be proved in accordance with Article 6.2. Article 6.2 differs in some respects from Article 15, which sets out the standard for proving injury in a countervailing duty investigation.

¹⁰ Article 6 of the SCM Agreement.

¹¹ Article 6.2 of the SCM Agreement.

mestic legislation. Such subsidies include those for certain research activities, development programs for disadvantaged regions, and adaptation to new environmental standards.¹² However, green light subsidies that cause “serious adverse effects” to the domestic industry of a Member may be referred to the SCM Committee, which may recommend that the subsidizing Member modify the program so as to eliminate those effects.¹³ In addition, the new WTO Agreement on Agriculture makes certain agricultural subsidies non-countervailable.¹⁴

EXPIRATION OF THE DARK AMBER AND GREEN CATEGORIES

Under Article 31 of the SCM Agreement, the provisions of Articles 6.1 (dark amber subsidies), 8 (green light subsidies) and 9 (green light/serious adverse effects) were to apply for only five years, unless the SCM Committee extended their application.¹⁵ The Committee did not extend their application and, accordingly, these provisions expired on December 31, 1999. As of July 1, 2000, the former green light subsidies became actionable under U.S. domestic legislation like any other “yellow light” subsidies.¹⁶

SCM Agreement Provisions Governing Members’ Remedies for Subsidies

Part V of the SCM Agreement is entitled “countervailing measures.” It contains a full range of rules governing the application by importing Members of countervailing duties to subsidized products from exporting Members. Among other matters not discussed above,¹⁷ these rules govern the procedures that importing Members must follow in conducting investigations of subsidies in ex-

¹² Article 8 of the SCM Agreement.

¹³ Article 9 of the SCM Agreement.

¹⁴ See Article 13 of the Agreement on Agriculture.

¹⁵ These categories are based on similar categories in the EC State Aids Code.

¹⁶ 9 U.S.C. § 1677(5B)(G).

porting Members, and the standards for determining whether the domestic industry in the importing Member has been injured. A Member may seek review before the WTO of an importing Member's imposition of countervailing duties on its exports, based on either the importing country's investigative procedure or on the methodology used to identify and measure the subsidy. CVD measures are also subject to judicial review in the domestic courts of the importing Member.

Special Provisions for Developing Countries

Article 27 of the SCM Agreement provides for the special and differential treatment of developing country Members, both in Members' CVD investigations and in proceedings before the WTO. Among other things, it allows developing countries to phase out prohibited subsidies over an eight-year period,¹⁸ and modifies the injury standards applicable in WTO enforcement proceedings.¹⁹ There are also some special provisions that make it more difficult for importing Members to apply countervailing duties to exports from developing country Members.²⁰

Non-Market Economy Countries

The SCM Agreement does not distinguish between market economy countries and non-market economy countries, except to provide that transitioning economies are entitled to certain special treatment for a limited period of time.²¹ The pending accession of China to the WTO has raised the issue of how the SCM Agreement should be applied to a Member that is not a market economy. Members are

¹⁷ The definition of subsidy in Article 1 of the SCM Agreement also applies in proceedings under the Members' domestic legislation.

¹⁸ Article 27.2, 27.3, and 27.4 of the SCM Agreement.

¹⁹ Articles 27.7 - 27.9 of the SCM Agreement.

²⁰ See, e.g., Articles 27.10 - 27.12 and 27.14 of the SCM Agreement.

²¹ Article 29 of the SCM Agreement.

in the process of negotiating special arrangements that will govern how the SCM Agreement will apply to China.²²

Under the United States' CVD law, countervailing duties are not applied to non-market economy countries.²³ The underlying theory is that, in a market economy, subsidies distort supply and demand, resulting in a misallocation of resources. In contrast, in a non-market economy, the government itself largely directs the allocation of resources, supplanting the forces of supply and demand. Consequently, the concept of a subsidy as a distortion of normal market forces essentially has no meaning in a non-market economy.

Dispute Settlement Proceedings Under the Uruguay Round Regime

UNDER the Tokyo Round SCM Agreement, the losing country could (and normally did) "block" adverse panel decisions. This was possible because a "consensus" (unanimous support) was necessary in order to adopt a panel report.²⁴ Under the Uruguay Round SCM Agreement, panel reports are adopted unless there is a consensus *not* to adopt them (or a party informs the Dispute Settlement Body of its intention to appeal to the newly-established WTO Appellate Body.²⁵ Given that the complaining country presumably will not join a consensus *not* to adopt a remedy that it has requested and obtained, this means that, as a practical matter, WTO panel reports will always be adopted.

Several key WTO panel reports and Appellate Body decisions affecting the SCM Agreement are discussed below.

²² See, e.g., United States-China bilateral SCM Agreement, dated November 15, 1999 (available at <http://www.uschina.org>).

²³ This was the position taken by IA and affirmed by the Federal Circuit in *Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1989).

²⁴ Article 21 of the Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance provides only that "Reports of panels and working parties should be given prompt consideration by the CONTRACTING PARTIES."

²⁵ Article 16.4 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding" or "DSU").

*Domestic Subsidies***UK BAR — PRIVATIZATION AND THE MEANING OF “BENEFIT”**

Since 1993, the U.S. Commerce Department has taken the position that, where subsidized companies are sold for fair market value, their exports remain subject to CVDs for those subsidies under their new ownership.²⁶ In 1999, the European Communities challenged this methodology before a WTO panel and obtained a decision (*UK Lead Bar*) holding that, in the circumstances of that case, at least, Commerce could not countervail the prior subsidies after the subsidized production unit was transferred to a distinct new owner.²⁷ The Appellate Body upheld the panel’s decision on appeal.²⁸

The key to the dispute was whether the effect of the sale of the subsidized productive unit was considered from the prospective of the productive unit’s new owner or that of the injured industry in the importing country. The EC argued that the perspective of the new owner should govern and that, since there was no benefit to the new owner, the company’s exports could not be countervailed after the change in ownership. The United States argued that the perspective of the domestic industry should govern, from which the perspective the benefit originally accrued to production, and continued to benefit that production after the change in ownership. The Panel appeared to agree with the EC, and ruled that the pre-privatization subsidies could not be countervailed after the change in ownership.²⁹

The key importance of the decision is that it could be interpreted to indicate that, in order to be regarded as having a “benefit” from a subsidy, the producer or exporter of merchandise to be

²⁶ This rule has applied regardless of whether the subsidized company was government-owned at the time of the sale (so that the sale was a privatization) or a privately-owned subsidized company was sold to another private owner.

²⁷ *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, 23 December 1999.

²⁸ See the Report of the Appellate Body. *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*. WT/DS138/AB/R, 10 May 2000.

countervailed must itself have received that subsidy directly from the government. The United States is troubled by the potential implication that a government could build an entire industry from scratch with subsidies and then, by selling that industry for its market value, insulate those subsidies from any liability for countervailing duties. In fact, the EC appears to interpret the panel report as holding that any sale of a subsidized business for fair market value terminates the countervailability of prior subsidies to that business.

Export Subsidies

THE MEANING OF "CONTINGENT UPON EXPORT" - AUSTRALIAN LEATHER

This case arose from the Australian Government's grant to an Australian automotive leather producer of export subsidies consisting of a \$A30 million cash grant and a 15-year, \$A25 million preferential loan.³⁰ In response to a challenge from the United States, a WTO panel ruled in May 1999 that the \$A30 million grant was a prohibited export subsidy because it was "contingent in fact" upon export performance. The panel's decision rested on the fact that the grant was based on performance targets set out in the grant contract between Australian Government and the recipient. The majority of the recipient's sales were for export and the Australian market for automotive leather was too small to absorb the expanded production as a result of the subsidy.

The panel ruled that the \$A25 million loan was not a prohibited export subsidy, because it was not contingent in fact upon the recipient's export performance. Nothing in the loan contract suggested a specific link to actual or expected exports, and the loan could be repaid with funds not necessarily related to export sales.

²⁹ However, the Panel (and, on appeal, the Appellate Body) assumed that the company after the change in ownership was a new entity, distinct from the original subsidy recipient. Its decision that a new benefit to that entity must be found as a condition of imposing countervailing duties depended upon that assumption.

³⁰ Initially, Australia couched its export subsidy program under the "Textile, Clothing and Footwear Import Credit Scheme," whereby exporters of eligible products could earn import credits. The United States challenged this scheme in the WTO, with the result that Australia agreed to settle the case by removing automotive leather from eligibility for the credits. However, soon after settling the dispute, Australia announced a new package of subsidies.

THE MEANING OF “CONTINGENT UPON EXPORT” - CANADIAN AIRCRAFT

Brazil and Canada challenged their respective export subsidies for small aircraft in “tit-for-tat” cases covering many billions of dollars in trade. In Brazil’s case against Canada, the panel held (and the Appellate Body agreed) that Canada’s two programs constituted prohibited export subsidies.³¹ With regard to the first program, the panel concluded that export credits at below-market rates were contingent in law on the Canadian industry’s export performance.

The other program was more subtle: it provided royalty-based financing at below-market rates of return for investments in projects that resulted in a high-technology product for sale in export markets. The panel found that, in designing the program, the Canadian Government expressly took into account the proportion of the sales that would be for export. Thus, the government’s expectation of exports or export earnings was a key fact in determining that the program was a prohibited export subsidy.

STRICT CONSTRUCTION OF THE SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES - BRAZILIAN AIRCRAFT

In Canada’s case against Brazil, the panel (and, on appeal, the Appellate Body) declined to give Brazil the benefit of an extended phaseout period for export subsidies which the Subsidies SCM Agreement grants to developing countries, because Brazil had so far failed to phaseout its subsidies, but instead had increased them. Accordingly, the panel found that Brazil’s export financing program, which allowed purchases of Brazilian regional aircraft to benefit from below-market interest rates, constituted a prohibited export subsidy.³²

*Remedies***THE MEANING OF “WITHDRAW THE SUBSIDY” - AUSTRALIAN LEATHER**

The panel in this proceeding recommended that Australia “withdraw” a \$A30 million export subsidy within 90 days, pursuant

³¹ Canada Aircraft, WT/DS70/R, adopted 20 August 1999.

³² A WTO arbitration panel has preliminarily found Brazil’s implementation to be deficient.

to Article 4.7 of the SCM Agreement. Australia announced that it would implement the panel's findings by requiring the recipient to refund \$A8 million of the \$A30 million grant. At the same time, the Australian Government extended a new loan of about \$A18 million to the recipient's parent company.

The United States challenged this implementation before a WTO arbitration panel, arguing that the recipient should have repaid a higher amount - the entire remaining value of the subsidy (excluding the portion already amortized). In January 2000, the Panel ruled that Australia had failed properly to implement the panel's original ruling, in part because the loan to the recipient's parent (which had been specifically conditioned upon repayment of the grant) nullified the repayment.³³

More importantly, the Panel ruled that by "withdraw the subsidy," Article 4.7 meant that the recipient must repay to the Australian Government *the entire subsidy it originally received* - a higher amount than the United States had argued should be refunded. The United States had agreed with Australia that a refund of the entire subsidy would amount to retroactive relief that was impermissible under the WTO system, which generally contemplates prospective remedies.³⁴ The Panel stated that it did not find the distinction between retroactive and prospective remedies "meaningful" in the context of Article 4.7 which requires that prohibited subsidies be "withdrawn."³⁵ Eventually, the United States and Australia notified the Panel of a mutually agreed solution to the controversy.³⁶

³³ *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW, 21 February 2000.

³⁴ To appreciate how this remedy was regarded as retroactive, it helps to recall that, in countervailing foreign subsidies, national authorities commonly amortize subsidies over time, countervailing a portion of the subsidy in each year. Consequently, if a WTO panel recommends that a Member "withdraw" a subsidy, there is a good chance that the Member will consider the subsidy remaining to be withdrawn as only the unamortized portion of that subsidy. Because the part that has been amortized has already been subject to countervailing measures it may be argued that any additional remedy is redundant.

³⁵ Australia Report, *supra*, at ¶ 6.22.

³⁶ See: WT/DS126/11G/SCM/D20/2, 31 July 2000.

WTO/Anti-dumping Rules

ZHANG YUEJIAO

Deputy Director

Asian Development Bank

Anti-dumping, the UR Agreement

Basic Principles

THE ANTI-DUMPING AGREEMENT (IMPLEMENTATION OF ARTICLE VI OF THE GATT 1994)

Three createas:

- Dumping is occurred: the introduction of a product into the commerce of another country at less than its normal value.
- Material injury: the domestic industry producing the like product in the importing country is suffering material injury.
- A causal linkage: there is a causal link between the two (Dumping and Injury).

Sales in the Ordinary Course of Trade

- The weighted average selling price is below the weighted average cost.

- 20% of the sales by volume were below cost.

Insufficient Volume of Sales

If home market sales constitute 5 percent or more of the export sales in the country, is deemed as sufficient sales.

Alternative bases for calculating normal value:

- The price of the product sold to a third country.
- “Constructed value”, cost of production, selling, general, profits and administrative costs.

Third Country Price as Normal Value

Non-market Economy

In the particular situation of Economies where the Government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State.

Sunset Rule

The dumping duty and the price undertaking shall not be more than 5 years.

The Spread of Anti-dumping

After Canada and the US adopted its anti-dumping laws, EU, New Zealand and Australia published their AD laws. Later on, South Korea, Mexico, Japan and China have had their AD laws.

The use of AD is increasing. In 1960s all GATT members filed only about ten anti-dumping petitions per year (Schott, 1994). Over the decades of 1980s, more than 1600 AD cases were filed worldwide (Finger, 1993). The US has filed more AD cases than others have. Over 700 AD petitions filed by the US industries between 1980 and 1994.

Japan, South Korea were main targets between 1970 to 1990. China, Pakistan and India were main targets since 1990.

Why AD is widely used?

- It is a protective measure for domestic industries.
- Reduce imports (30 – 50 %).
- Unilateral measures.
- Anti dumping duties are 10 to 20 times higher than the MFN level. (Even 100 times higher).
- It is legal under WTO to have domestic AD laws and proceedings.
- A formation of a great number of international trade lawyers profession and discipline (Trade police).

Impacts on Developing Countries

- Information nets work or IT technology for Developing countries' enterprises to set up a good pricing for their exports.
- Awareness of AD rules and practices.
- Expensive lawyers fee, reluctant to participate in the lawsuits.
- Discretions of importing country's investigation authorities. (Like product, normal value, decision made without investigates, etc.).
- Discrimination of some countries, such as non-market economy.

THE WTO ANTI-DUMPING AGREEMENT: A GUIDE FOR DEVELOPING COUNTRIES

JOSEPH W. DORN and DUANE W. LAYTON

*Attorneys, International Trade and Customs Group
King and Spalding
Washington, D.C.*

Introduction

THE General Agreement on Tariffs and Trade 1994 (“GATT 1994”), which is administered by the World Trade Organization (“WTO”), permits WTO Member countries to provide affected domestic industries with tariff and other relief against imports under circumstances narrowly defined in the GATT 1994 and related agreements (the “WTO Agreements”).

The WTO Agreements generally permit three kinds of trade remedies. First, a Member may impose anti-dumping duties against imports which are sold at dumped prices if they cause or threaten to cause material injury to a domestic industry. Second, a Member may impose countervailing duties against imports that are subsidized if the imports cause or threaten to cause material injury to a domestic industry. Third, a country may take a “safeguard” action by imposing either an import quota or duties on imports of a product from all countries if increased imports are causing or threatening to cause serious injury to domestic producers.

Because the WTO Agreements specifically prohibit Member countries from establishing quotas or raising duties on imports from other

WTO countries except in very limited circumstances, any relief against imports other than through an anti-dumping, countervailing duty, or safeguard action would likely violate the importing country's WTO obligations. An investigation by a Member to determine whether any of these forms of relief is appropriate must adhere to the strict requirements of the WTO Agreements.

Anti-dumping remedies are by far the most common form of import relief. As of September, 2000, anti-dumping remedies have been imposed by approximately 35 WTO Members. In contrast, only 13 Members have imposed countervailing duties, and only 14 Members have imposed safeguard measures. This article will concentrate on the rules applicable to anti-dumping actions.

Overview

APPLICATION OF ANTI-DUMPING DUTIES BY WTO MEMBER COUNTRIES

Dumping is essentially price discrimination between purchasers in different national markets. Dumping occurs most often when a company sells a product in an export market at a lower price than it sells the product in its own country. A product need not be sold below cost to be dumped, although below-cost pricing will often result in dumping.

Anti-dumping duties may be assessed when the investigating authorities in the importing country determine that an imported product is dumped and that the dumped imports are causing or threatening to cause material injury to a domestic industry. They are collected by the customs authorities of the importing country. No direct compensation or award of damages is made to domestic producers.¹

¹ On October 28, 2000, President Clinton signed into law the Continued Dumping and Subsidy Offset Act of 2000. Otherwise known as the "Byrd Amendment," in honor of its chief sponsor Senator Robert Byrd from the State of West Virginia, the new legislation will cause dumping duties to be deposited into a special account that could be accessed by companies in the United States that petitioned for anti-dumping relief or that supported the original petition, provided that they have made "qualifying expenditures" since the anti-dumping order was imposed. The "qualifying expenditures" listed in the law include spending for new equipment, facilities, research and development, personnel training, and acquisition of raw materials. The European Communities and others have voiced strong opposition to the measure. They believe it violates the WTO prohibition on direct compensation.

The imposition of anti-dumping duties generally benefits domestic producers by causing a cessation or reduction of imports. The liability for payment of duties is on the importer, which may not be able to pass on the added cost of doing business to its customers. As a result, the importer may shift its sourcing of the affected product to another country or stop importing the product altogether.

Even if the duties do not result in a cessation of imports, they can greatly affect the price of the product and the exporter's profitability. The duties can also discourage other foreign producers from exporting at dumped prices to the country imposing the duties.

While various justifications for anti-dumping measures have been advanced, the principal justification over the years has been the belief that foreign producers can use high-priced sales in their protected home markets to subsidize low-priced sales in the importing country, all to the detriment of their competitors in the importing country. Anti-dumping laws attempt to remedy this by imposing an additional duty on dumped imports equal to the amount of the price discrimination.

THE WTO ANTI-DUMPING AGREEMENT

WTO Members are not required to adopt anti-dumping legislation. If, however, a Member chooses to combat dumped imports, it must do so pursuant to an investigation that adheres to the strict requirements of the Agreement on Implementation of Article VI of the GATT 1994 (the "AD Agreement").

The AD Agreement requires Members that have adopted anti-dumping laws and regulations to notify them to the WTO. Currently, 62 of the 138 Members have notified the WTO of their adoption of anti-dumping laws. The AD Agreement also requires Member countries to submit a report of all anti-dumping actions they have taken, as well as a list of all anti-dumping measures in force. As of September 15, 2000, 37 nations had notified the WTO that they have initiated anti-dumping cases. The newest users of anti-dumping measures include developing countries such as Guatemala, Egypt, Ecuador, and the Philippines.

Status Of Developing Countries

Article 15 of the AD Agreement recognizes that “special regard” must be given by developed countries to the “special situation” of developing country Members when considering the application of anti-dumping measures. Article 15 also provides that developed countries must “explore” the possibility of “constructive remedies” provided for in the AD Agreement “before applying anti-dumping duties where they would affect the essential interests of developing country Members.”²

In *European Communities - Anti-dumping Duties On Imports Of Cotton-Type Bed Linen From India*, the WTO panel ruled that the term “constructive remedies” refers to price undertakings under Article 8 of the AD Agreement and the possibility of a “lesser duty” under Article 9.³ It rejected India’s argument that the term encompassed no anti-dumping duty at all.⁴

One of the more interesting aspects of the *Bed Linen* report was the panel’s interpretation of the term “explore” in Article 15. According to the panel, this language required an investigating authority “to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.”⁵ In the case before it, the panel found that the European Communities had failed to do anything “different in this case, than it would have done in any other anti-dumping proceeding — there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation imposed by Article 15 of the AD Agreement.”⁶ According to the panel, “[p]ure passivity is not sufficient . . . to satisfy the obligation to ‘explore’ possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned.”⁷

² AD Agreement, Art. 15.

³ Report of the Panel, WT/DS141/R, circulated October 30, 2000, para. 6.229.

⁴ *Id.*, para. 6.228.

⁵ *Id.*, para. 6.233 (emphasis added).

⁶ *Id.*, para. 6.238.

⁷ *Id.*

Procedural Rules

Contents Of The Anti-Dumping Application — “Lessons” From Guatemala - Cement And Mexico - Corn Syrup Cases

An anti-dumping investigation is normally initiated based on an application filed by or on behalf of the domestic industry.⁸ The application must include relevant evidence (not just simple assertions) of (a) dumping, (b) injury or threat of injury, and (c) a causal link between the dumping and the injury.⁹ At a minimum, the application must include information reasonably available to the applicant on the items in subparagraphs (i) to (iv) of Article 5.2 of the AD Agreement, including information relating to the product, the industry, the foreign producers, the importers, evidence of dumping, and factors showing injury and causal link.

Article 5.3 provides, in turn, that “[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.” In other words, compliance with the requirements of Article 5.2 does not necessarily mean that sufficient evidence exists to justify initiating an investigation under Article 5.3.¹⁰ In the first anti-dumping case subject to WTO dispute settlement procedures, the panel in *Guatemala - Cement* did not define what constitutes “sufficient evidence” to initiate an investigation.¹¹ It did, however, agree with the panel in *United States - Measures Affecting Imports Of Softwood Lumber From Canada* that the “quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation.”¹²

⁸ AD Agreement, Art. 5.1. Investigations may also be “self initiated” by the government. *Id.*, Art. 5.6.

⁹ *Id.*, Art. 5.2.

¹⁰ Report of the Panel, *Guatemala - Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, adopted as modified by Appellate Body November 25, 1998, para. 7.51 (“*Guatemala - Cement*”).

¹¹ *Id.* para. 7.54.

¹² *Id.* para. 7.57.

Finally, Article 5.3 only requires investigating authorities to determine whether there is sufficient evidence to justify initiation. In *Mexico - Anti-dumping Investigation Of High Fructose Corn Syrup (HFCS) From The United States*, the WTO panel ruled that Article 5.3 “does not impose an obligation on the investigating authority to set out its resolution of all underlying issues considered in making that determination.”¹³

Rights Of Foreign Producers To Participate

Article 6 of the AD Agreement provides that all interested parties in an anti-dumping investigation shall have full opportunity for the defense of their interests. In particular, Article 6.1 establishes that all interested parties must be given notice of the information which the authorities require and ample opportunity to present all evidence they consider relevant in respect of the investigation. “Interested parties” include “(i) an exporter or foreign producer or the importer of a product subject to investigation...; (ii) the government of the exporting Member; and (iii) a producer of the like product in the importing Member....”¹⁴

Access To Record

All interested parties must be given access to the record in order to have a full opportunity for the defense of their interests. Article 6.1.2 of the AD Agreement establishes that the evidence presented by one of the interested parties “shall be made available promptly” to the other interested parties. Moreover, Article 6.4 provides that all interested parties shall be given “timely opportunity” to see all information that is relevant to the presentation of their case.

Use Of Non-Governmental Experts During Verification Of Questionnaire Responses

Annex I of the AD Agreement expressly permits WTO Members to use non-governmental experts in the investigating team during veri-

¹³ Report of the Panel, WT/DS132/R, adopted February 24, 2000, para. 7.102 (emphasis in original).

¹⁴ AD Agreement, Art. 6.11.

fication of questionnaire responses. This is an important right, especially for developing countries that may lack the expertise to conduct an effective on-site verification of questionnaire responses. Guatemala, for example, retained the services of non-governmental experts from the United States to help it with on-site verification in Mexico during its first anti-dumping investigation in 1996.

In order to use non-governmental experts, though, the companies of the exporting Member and its governmental authorities must be informed. In addition, non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

Right Of Judicial Review

Article 13 of the AD Agreement requires every WTO Member that conducts anti-dumping investigations to maintain a system for promptly reviewing the determinations of the investigating authorities. Review may be by a court or by an arbitral or administrative tribunal. The court or tribunal must be independent of the investigating authorities responsible for issuing the determinations under review.

Substantive Rules

Definition Of Dumping

Under the WTO AD Agreement, dumping is generally defined as selling a product in an export market at a lower price than the price at which the product is sold in the exporter's home country. In order to ensure that the comparison is as fair as possible, investigating authorities are required to make numerous adjustments to the prices under consideration. What the authority essentially tries to do is to determine what would happen if a purchaser in the importing country and a purchaser in the home market (or third country) arrived at a foreign producer's factory gate at the same time seeking to buy identical merchandise. Would the foreign producer sell to the two purchasers at different prices?

Sample Dumping Calculation

In an anti-dumping investigation, the dumping margin for each foreign producer or exporter is determined by comparing the “export price” (the price paid for the goods in the importing country) to the “normal value” (usually the price of the same or most similar product sold in the home market of the exporting country). Article 2.4 of the WTO AD Agreement requires that a “fair comparison” be made between the export price and the normal value. Thus, the comparison should be made at the same level of trade, normally at the ex-factory level, and on sales that are as contemporaneous as possible. In making this comparison, the authorities must make adjustments to the selling price in each market to account for differences in the transactions that affect “price comparability,” such as differences in conditions and terms of sale, taxation, levels of trade, quantities, and the physical characteristics of the products. In addition, in determining the normal value, investigating authorities may disregard home market sales that are made at prices below the per unit (fixed and variable) cost of production or that otherwise are made under such unusual circumstances that they are made outside the ordinary course of trade.

The dumping margin is the difference between the exporter’s ex-factory price for sales in its home market (the normal value) and the exporter’s ex-factory price for sales in the importing country (export price), expressed as a percentage of the export price. For example, if the exporter’s ex-factory price is \$100 to customers in the home market and \$80 for the identical product to customers in the importing country, the dumping margin is calculated as follows:

$$\frac{100-80}{80} = \frac{20}{80} = 25\%$$

This percentage margin determines the amount of anti-dumping duties that will be imposed in the event of affirmative dumping and injury determinations.

If there are no home market sales of the product at issue or too few home market sales to allow a meaningful comparison between the home market sales and the export price, Article 2.2 of the AD Agreement permits investigating authorities to instead compare the export price to the ex-factory price for sales to a representative third

country. Alternatively, normal value may be based on a constructed value that is calculated as the cost of production of the product plus reasonable amounts for administrative and selling expenses, packing, and profit.

Definition Of Injury

PRESENT MATERIAL INJURY

In determining whether dumped imports are injuring the domestic industry, the investigating authorities are required, pursuant to Article 3 of the AD Agreement, to examine the volume of imports, the effect of imports on prices in the domestic market, and the consequent impact on domestic producers. The evaluation of the impact of dumped imports on the domestic industry must include all relevant economic factors, including (1) actual and potential declines in sales, profits, output, market share, productivity, return on investments, and capacity utilization; (2) factors affecting domestic prices; and (3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investments. The authorities are also required to consider any factors other than dumped imports that may be injuring the domestic industry. This aspect of the analysis, known as “causal link,” is discussed more fully below.

THREAT OF INJURY

According to Article 3.7 of the AD Agreement, a threat determination may not be based on mere allegation, conjecture, or remote possibility. Rather, the circumstances that would result in injury to the industry must be clearly foreseen and imminent. In evaluating the existence of a threat of injury, the investigating authorities should consider, among other factors, (1) whether dumped imports have substantially increased; (2) whether foreign exporters’ excess capacity or substantially increasing capacity indicates the likelihood of increased exports to the importing country’s market; (3) whether imports are entering at prices that would have a significant depressing or suppressing effect on domestic prices and would likely increase demand for further imports; and (4) the existence and magnitude of inventories of the product being investigated.

DEFINITION OF THE DOMESTIC INDUSTRY

An important issue in many investigations is identifying the domestic industry that the investigating authorities should examine in determining whether the industry is injured or threatened with injury by reason of the dumped imports. Article 4.1 of the AD Agreement defines the industry as the domestic producers of a product that is identical or similar to (*i.e.*, “like”) the imported product under investigation. The decision whether to define the affected industry broadly or narrowly often has a significant effect on the outcome of the investigation. Generally, the more narrow the definition of the industry, the greater the likelihood of an affirmative injury determination. A broader definition will often diffuse any harm to producers by reason of the imports and result in a negative injury determination. Under certain circumstances, investigating authorities may examine the question of injury to a group of isolated producers constituting a “regional” industry, rather than a national industry made up of all producers.

Causal Link

In order to demonstrate that injury or threat of injury to the domestic industry is being caused by dumped imports, and not by other factors, the investigating authorities must conduct a “causal link” analysis. Article 3.5 of the AD Agreement provides that “it must be demonstrated” that dumped imports are the cause of injury. The “causal relationship” between the dumped imports and the injury to the domestic imports must be based on the examination of all relevant evidence. The investigating authorities must also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry. Factors which may be relevant include the volume and price of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, developments in technology, and the export performance and productivity of the domestic industry. Article 3.5 prohibits the authorities from attributing the injury caused by these factors to the dumped imports.

Remedies

Permissible

PROVISIONAL DUTIES

Investigating authorities may impose a provisional anti-dumping duty consistent with the obligations under Article 7 of the AD Agreement. Under Article 7.1, authorities may apply a provisional measure if they have (1) initiated an investigation in accordance with Article 5 and provided interested parties with adequate opportunities to submit information and make comments; (2) made a preliminary determination of dumping and consequent injury to the domestic industry; and (3) judged that a provisional measure is necessary to prevent injury caused during the investigation.

Investigating authorities may not apply a provisional measure any sooner than 60 days after the date of initiation. In addition, the application of such measures must be limited to four months, except in certain narrow circumstances, when a provisional measure may be applied for six months.

FINAL DUTIES

If the investigating authorities make a final determination of dumping and injury to the domestic industry, the investigating authorities may publish an anti-dumping order. According to Article 9.3 of the AD Agreement, the duties may not exceed the amount of dumping determined in the investigation. Duties may be lower than the dumping amount if the authorities determine that the lower duty is sufficient to remedy the injury to the domestic industry.

Article 9 of the AD Agreement establishes that dumping duties may be assessed prospectively or retrospectively. If prospectively, the rate of duties determined in the investigation apply to all future imports. The importer can request a review to reduce or eliminate the duty. If the duties are applied retrospectively, the importer posts cash deposits at the time of importation and then may seek a review to determine the definitive amount of duty. If the actual duty is higher than the cash deposit rate, the importer must pay the difference. If the actual rate is lower than the cash deposit rate, the im-

porter obtains a refund. If no review is requested, duties are assessed at the cash deposit rate.

PRICE UNDERTAKING

An anti-dumping investigation may be suspended without the imposition of duties if an exporter agrees to enter into a “price undertaking” to revise its prices or cease exports at dumped prices so that the injurious effect of dumping is eliminated.¹⁵ Investigating authorities may not seek or accept undertakings unless they have first made affirmative preliminary determinations of dumping and injury.

The investigating authorities may require exporters to provide information periodically to demonstrate their compliance with the undertaking and to permit verification of the information. If an understanding is violated, the authorities may immediately apply provisional measures and renew the suspended investigation.

Impermissible

QUOTAS

Quotas are a type of restraint on imports (an upper limit on the quantity or value of imports allowed by a country during a given time period). The WTO Agreements specifically prohibit WTO Member countries from establishing quotas on imports from other WTO countries except in very limited circumstances. Any relief against dumped imports other than anti-dumping duties or a price undertaking would likely violate the importing country’s WTO obligations.

RETROACTIVE DUTIES PRIOR TO DATE OF INITIATION

According to Article 10.1 of the AD Agreement, provisional duties and definitive duties shall only be applied to products which enter for consumption after the time when the decision, either provisional or final, enters into force. In special circumstances, however, de-

¹⁵ *Id.*, Art. 8.

finitive anti-dumping duties may be imposed on products which were imported not more than 90 days prior to the date of application of provisional measures, provided that such duties are not applied to products imported prior to the date of initiation of the investigation.¹⁶

PRIVATE RIGHT OF ACTION

As noted above, anti-dumping duties are collected by the customs authorities of the importing country. In *United States - Anti-dumping Act of 1916*, the WTO panel ruled that anti-dumping duties (and price undertakings) are the only means sanctioned by the WTO Agreements to combat dumping.¹⁷ In particular, fines, imprisonment, and private right of action for damages are not permitted.¹⁸

Sunset Reviews

ACCORDING to Article 11.3 of the AD Agreement, anti-dumping measures are required to be terminated five years after their imposition, unless it is determined (in a “sunset” review) that expiration of the measure “would be likely to lead to continuation or recurrence” of the dumping and injury. Sunset reviews must begin before expiration of the five-year period and “normally” must end within a year of their initiation.¹⁹

¹⁶ *Id.*, Art. 10.8.

¹⁷ Report of the Panel, WT/DS136/R, adopted as upheld by Appellate Body September 26, 2000.

¹⁸ *Id.*, para. 6.204. *But see* note 2 *supra* (discussing “Byrd Amendment” which indirectly compensates petitioning U.S. companies).

¹⁹ AD Agreement, Art. 11.4.

WTO Challenges

The Dispute Settlement Understanding

In 1994, the new WTO dispute settlement rules were established under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”). Among other things, the DSU provides binding procedures to resolve disputes among WTO Member countries as to whether measures imposing anti-dumping duties are consistent with the AD Agreement.

As a result, WTO Member countries are increasingly seeking review of anti-dumping measures under WTO dispute settlement procedures. Petitioners and their counsel may need to work with the investigating authorities to ensure that all WTO obligations are satisfied during the investigation and to provide support in defending complaints that the export country might bring before a WTO dispute settlement panel.

Measures That Can Be Challenged

Three types of anti-dumping measures are specified in Article 17.4 of the AD Agreement: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures (assuming they have a “significant impact” on the trade interests of the complainant). In *Guatemala - Cement*, the WTO’s Appellate Body held that each of these measures is separate and distinct from the other.²⁰ Thus, for example, an attack on a final duty does not implicate (or challenge) a provisional duty.

Disputes under the AD Agreement relating to a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure must be identified as part of the “matter” referred to the WTO Dispute Settlement Body (“DSB”) pursuant to the provisions of Article 17.4 of the AD Agreement. A “matter,” according to the WTO Appellate Body, is composed of the measure at issue and the claims that challenge the measure.²¹

²⁰ Report of the Appellate Body, WT/DS60/AB/R, adopted November 25, 1998, para. 79.

²¹ *Id.* para. 72.

STANDARD OF REVIEW

The AD Agreement establishes a standard for the review of anti-dumping determinations by a panel established by the WTO. The WTO panel must determine whether the investigating authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, the evaluation should not be overturned, even if the panel reviewing the determination might have reached a different conclusion. Thus, panel review is not a substitute for proceedings conducted by national investigating authorities. Moreover, the panel must limit its review to the facts that were before the investigating authority when it made its determination (*i.e.*, the evidence contained in the administrative record).

Practical Issues for Developing Countries

BEFORE a country can conduct an anti-dumping investigation, it must possess the resources and expertise needed to handle the case and avoid violations of the WTO Agreements. As the above discussion demonstrates, anti-dumping is a highly specialized area of the law. In most cases, a developing country that wishes to establish an anti-dumping unit will have to start "from scratch" in terms of personnel, resources, and facilities. Ideally, the government will have adequate time to hire and train its staff before the first application is filed. In most cases, however, an industry is demanding relief from injurious dumping and the government is struggling at the same time to create an anti-dumping unit. Therefore, a few words about the establishment of an anti-dumping unit seem in order.

Staff And Expertise

An anti-dumping investigation is a quasi-judicial proceeding. The investigating authority hears arguments, reviews evidence, and makes one or more decisions that must, according to Article 13 of the AD Agreement, be subject to judicial review. Throughout this process,

the authority must identify and construe legal requirements that may operate on both the domestic and international legal planes. For this reason, access to experienced legal counsel is an important component of every successful anti-dumping unit.

In addition, anti-dumping investigators must be capable of handling detailed accounting and financial data. For example, the ability to trace figures back through a company's audited financial statements is an essential part of an effective on-site verification. For this reason, every anti-dumping unit should have access to trained accountants.

Finally, the assessment of injury and causal link requires an understanding of economic theories and models. Therefore, developing countries are strongly encouraged to have one or more economists within their anti-dumping units.

In addition, developing countries are reminded that nothing in the WTO Agreements prevents investigating authorities from retaining the services of non-governmental experts to help with individual investigations. Indeed, it will be recalled that Annex I of the AD Agreement expressly condones the use of such experts during on-site verification of questionnaire responses.

Training

In many developing countries, access to experienced personnel in these areas is difficult. Therefore, in most cases, countries hire the most qualified candidates and then subject them to intensive training.

Training is available in several forms. First, certain international organizations and governments will provide seminars and other short tutorials to developing countries on anti-dumping matters and procedures. The WTO, for example, conducts courses in anti-dumping (and other trade areas) in Geneva and other locations. Second, private-sector experts in Brussels, Washington, and several other cities will often provide technical assistance to government officials. This can be done in the foreign capital or within the developing country. Finally, some countries, such as Egypt, have been very successful at arranging in-country technical assistance over extended periods through such agencies as the U.S. Agency for International Development.

Resources And Facilities

In addition to the necessary personnel and expertise, investigating authorities need to establish a dockets room, a central records unit, and a hearing room. The dockets room will receive filings from interested parties. The central records unit will store the records of all proceedings, including the public documents which must be available for inspection.²² Finally, pursuant to Article 6.2 of the AD Agreement, interested parties have the right to present oral argument at a hearing conducted by the investigating authority. Therefore, the authority must, at a minimum, set aside a room where the parties may present their cases and be subject to examination by the investigators.

In addition, governments are encouraged to invest in computers equipped with word processing and spreadsheet packages. At some point, every authority should also obtain a software program that can calculate the dumping margin. Dumping calculations can be extremely complicated and tedious. A good software program will, at a minimum, free the investigators from some of the more routine tasks associated with the calculation.

Expense

At the outset, governments are encouraged to hire at least one administrative manager, one lawyer, one accountant, one economist, and two secretaries. Once the nucleus of an anti-dumping unit is established, it can receive training overseas or in-country.

One of the most important variables in the cost of any case is whether the questionnaire responses of the foreign exporters will be verified. While on-site verification is not explicitly required by the AD Agreement, authorities are under an obligation to satisfy themselves as to the accuracy of the information upon which their decisions are based.²³ It is not uncommon for an on-site verification in just one investigation to take ten days and cost \$50,000. For some developing countries, this kind of expense is prohibitive, especially when it is added to the other expenses associated with establishing an anti-dumping unit.

²² AD Agreement, Art. 6.4.

²³ *Id.*, Art. 6.6.

Conclusion

ONE of the major trends in international trade today is the widespread use of anti-dumping laws by countries around the world. This trend has grown in part because of globalization, and in part because the WTO has succeeded to a large extent in eliminating secret quotas and other illegitimate trade barriers, leaving anti-dumping duties as one of the few WTO-legitimate ways for national industries to address import competition.

More than 60 countries have notified the WTO that they have enacted anti-dumping laws. Of these, approximately 37 have actually initiated anti-dumping cases and 35 have imposed anti-dumping measures. In just the first seven months of 2000 the WTO has been notified of more than 250 anti-dumping actions. More can be expected.

International trade is becoming increasingly rules based and anti-dumping actions are an important aspect of this phenomenon. Developing countries need to understand the rules applicable to anti-dumping duties. They need to understand these rules from the perspective of both their exporters and their domestic industries.

The present article summarizes this important and growing aspect of international trade. Developing countries that need training in connection with anti-dumping actions should contact the WTO and consult with qualified legal counsel.

Dispute Settlement

The WTO Dispute Settlement System

WILLIAM J. DAVEY

*Edwin M. Adams Professor of Law
University of Illinois College of Law*

THE World Trade Organization's dispute settlement system is a central element in providing security and predictability to the multilateral trading system. It ensures that the rules negotiated by WTO Members will in fact be observed. This brief paper describes the four phases of WTO dispute settlement: consultations, the panel process, appeal and surveillance of implementation. Thereafter, it reviews the operation of the system to date and then considers possible reforms.

Outline of the WTO Dispute Settlement System

THE first stage of WTO dispute resolution system is consultations. Their goal is a mutually agreed solution. The requirement that Members discuss the matter before proceeding to the more legalistic panel stage seems to work. From January 1995 through September 2000, there were around 205 consultation requests. Roughly one-half of the requests do not move to the panel stage, whether because of settlements or other reasons.

If consultations fail to resolve a dispute within 60 days, the complaining party may request the WTO's Dispute Settlement Body (DSB), which consists of all WTO Members, to establish a panel to

rule on the dispute. The DSB must do this unless there is consensus to the contrary in the DSB, which means that a complaining party may insist that a panel be established. A panel is composed of three international trade experts. Normally, the parties agree on the identity of the experts, but if they cannot, the WTO Director-General may be asked to appoint the panelists. Once composed, the panel receives written submissions from the parties and holds at least two hearings. A panel is required to make an objective assessment of the relevant facts and to determine whether the challenged measure conforms to the relevant WTO agreements. If a violation is found, a panel recommends that the measure be brought into conformity with WTO obligations. A panel should circulate its report to WTO Members within nine months of its establishment. The report must be adopted by the DSB absent a consensus to the contrary or an appeal.

A panel report may be appealed to the WTO Appellate Body, which did not exist in the GATT system and which consists of seven individuals appointed by the DSB for four-year terms. The Appellate Body hears appeals in divisions of three. Its review is limited to issues of law and it may affirm, modify or reverse panel reports. It is to rule within 90 days and its report (along with the panel report as modified) must be adopted by the DSB unless there is a consensus to the contrary. Thus, there is always a result, unlike the situation under GATT, when a consensus (including the losing party) was needed to adopt a report.

Where a violation is found, the DSB exercises a surveillance function over the implementation of the panel/Appellate Body reports. If immediate implementation is impractical, a reasonable period of time may be set (by arbitration if not agreed). If there is a dispute over whether implementation has occurred, the matter may be referred to the original panel (a "compliance" panel) for a determination. If implementation does not occur within the reasonable period of time, the prevailing party may request compensation. If that is not forthcoming, the DSB must authorize, on request and absent consensus to the contrary, the prevailing party to suspend concessions owed to the non-implementing party (i.e., to take retaliatory measures, such as increasing tariffs on products from that party). Disputes over the level of retaliation are resolved by arbitration.

Operation of the WTO Dispute Settlement System: 1995-2000

WTO Members have demonstrated considerable confidence in the WTO dispute settlement system to date by making extensive use of it. Consultations requests have been made at a rate of 40/year. As of September 2000, panels and/or Appellate Body reports had been adopted in 39 cases (29 after appeal), while 19 cases were at various stages in the dispute settlement process. In addition, there have been 5 panel reports adopted in compliance proceedings (2 after appeal), with one now pending. There have been 5 arbitrations on retaliation levels.

The record of implementation of the 39 adopted reports is relatively good. No implementation was required in 6 cases as the complainant lost and in 7 others the deadline for implementation had not occurred as of September 2000. Of the 26 cases where implementation was due as of September 2000, there were only 6 problem cases. In two, implementation had not occurred despite the passage of considerable time. The EC was found not to have complied in the *Bananas* case in April 1999 and admitted it had not complied in the *Hormones* case as of the expiration of the reasonable period of time in May 1999. Of the other four cases, in one – involving Japanese rules on establishing the safety of fruit imports, negotiations between the US and Japan on technical matters have been ongoing for many months; in the two aircraft export subsidy cases involving Brazil and Canada, they were each found not to have complied in part as of August 2000 and are negotiating over terms of a settlement; and in the *DRAMS* case, Korea has brought a compliance panel proceeding against the US, although it was suspended in September 2000 to allow for further settlement negotiations, which reportedly have succeeded. Thus, only *Bananas* and *Hormones* can be viewed as compliance failures at this point.

The US and Ecuador were authorized to retaliate in the *Bananas* case and the US and Canada were authorized to retaliate in the *Hormones* case. Canada has had its potential retaliation amount arbitrated in its dispute with Brazil over aircraft export subsidies, but has not yet sought authorization to retaliate. The fact that retaliation has not led to a resolution of the *Bananas* and *Hormones* cases raises the question (discussed below) about the desirability and effectiveness of retaliation as a remedy for non-compliance.

Possible Reforms to the WTO Dispute Settlement System

IN 1998-1999, the DSB conducted a review of the WTO's dispute settlement procedures. The Members participating in the review expressed general overall satisfaction with its operation, although a number of significant reform proposals were made. In the end, the review concluded in July 1999 without any changes being proposed. There are a number of areas, however, in which reforms should be considered.

First, the *Bananas* case demonstrated that it is necessary to clarify the provisions applicable to authorizing suspension of concessions when there is a dispute over the WTO-consistency of implementation measures. From the text, it is possible to argue that such authorization (i) should await a determination of inconsistency in a compliance panel procedure (subject to appeal) or (ii) must occur, if at all, within 30 days of the expiration of the deadline for implementation. There could be a difference of one year in these two times. Logically, a decision on consistency must be made before suspension is authorized, whether by arbitrators in ensuring that the level of suspension is equivalent to the level of inconsistency or in a separate proceeding. This issue was extensively discussed in the review, and prior to the Seattle ministerial conference, a number of Members proposed a procedure that would allow 90 days for a compliance panel proceeding, followed by a 45-day arbitration of retaliation levels (if requested). The proposal also contained additional amendments to reduce the time devoted to other phases of the dispute settlement process so that the overall time of the dispute settlement process would not be lengthened. Although the proposal enjoyed broad support, no action on any matter was taken at Seattle. An agreement along these lines should be possible and is imperative so as to allow the orderly functioning of the DSB.

Second, the operation of the dispute settlement system could usefully be made more transparent. In this regard, more participatory rights should be afforded to Members with a third-party interest in a case. Such a change was contained in the Seattle proposal mentioned above and enjoys universal support. More controversially, the United States has proposed that written submissions to panels and the Appellate Body be made public, that panel/Appellate Body hearings be open to the public, that amicus briefs be per-

mitted and that panel reports be circulated more promptly. The first three changes are opposed by many developing countries as incompatible with the notion of government-to-government dispute settlement, although it would seem that such changes would have no negative impact on the system. Submissions are described in great detail in the reports, so their public release is only a question of timing. Admission of the public would be unlikely to affect proceedings, especially since public access would probably have to be by closed-circuit TV because of space limitations in WTO meeting rooms. Permitting the submission of amicus briefs does not mean that their views will be followed and rules could be devised to ensure that Members would be able to respond to any amicus arguments that might potentially be relied upon by a panel or the Appellate Body. Faster circulation is mainly a budgetary matter (i.e., more translators). The system could easily accommodate these changes. Since they would remove a major ground for criticizing the system by developed country NGOs, it would be in the best interest of the system to adopt them.

A third area of concern involves panelist selection. This has taken more time (10 weeks on average as opposed to the expected 3 weeks) and required more intervention by the Director-General than anticipated. Indeed, the Director-General has appointed roughly 40% of panels to date. This situation is undesirable. It leads to delays and, more significantly, involves the Director-General in disputes in a way that could compromise his neutrality for other, more important purposes, such as brokering compromises in negotiations. These problems would be avoided by an EC proposal for a permanent panel body, from which all panelists would be chosen. This seems to be a logical and inevitable consequence of having a permanent Appellate Body. It would have obvious advantages – a much faster selection process, panelists with greater legal procedural and substantive expertise. The downsides would be the same as apply in the case of the Appellate Body – difficulty in selecting the panelists initially, possible politicalization of the system. These potential negatives do not seem to have prevented the Appellate Body from establishing itself as an effective institution. This reform certainly would be appropriate in the longer term.

A fourth issue is the position of developing countries in the dispute settlement system. They have become more frequent (and successful) complainants compared to the GATT system, but even

more so, they have become frequent targets. As a result, there is a need to expand the resources available to developing countries to participate more effectively in the system. A recent initiative establishing an organization (the Advisory Centre on WTO Law) to provide cut-rate legal assistance in WTO matters may help accomplish this. However, it will remain necessary to create more in-house WTO expertise, which will require the expansion of WTO technical cooperation activities. It has also been argued that there should be more preferential treatment of developing country Members in dispute settlement. It may be questioned whether more such provisions will make much difference, but they would not likely negatively affect the system.

Fifth, while the record of implementation or compliance has been relatively good, as described above, the use of retaliatory measures in *Bananas* and *Hormones* has raised a number of questions as to what would be the most desirable remedies to have in the WTO system to offset continuing violations of WTO obligations. Most fundamentally, those two cases have shown the shortcomings of relying on retaliation as a remedy, as it may not lead to compliance. Additionally, retaliation results in an overall lower level of trade liberalization, whereas it would be more desirable to promote the payment of compensation in some form (e.g., reduced trade barriers). Moreover, retaliation may well be used effectively only by major trading nations, thus creating an imbalance between Members in the area of effective remedies. Thus, while the WTO's dispute settlement system's experience with remedies for non-compliance is limited, it already appears that more creative thinking needs to be done in this area.

A final issue concerns resources. The system is under-staffed. This issue is simply a budgetary one, although continued inattention to it could in the end be one of the greatest threats to the system.

The record of the first 5 $\frac{3}{4}$ years of the WTO dispute settlement system has been exemplary and compares quite favorably with other international, state-to-state dispute settlement. One should not be complacent, however. While the implementation record has been reasonably good, it must be stressed that a failure of major trading partners (the EC and the US) to implement decisions in favor of developing countries could fatally undermine the system since it would lead to charges that the system was simply a mechanism to

put pressure on developing countries and provided them with no real benefits. With more pressure for better implementation and with the changes outlined above, the future of the system can be assured.

WTO Agreements Cannot Be Read in Clinical Isolation from Public International Law (AB Report in *US – Gasoline*¹)

GABRIELLE MARCEAU

*Counsellor, Legal Affairs Division
World Trade Organization (WTO)*

Introduction

THERE exists a spectrum of views about the extent to which the WTO system is, and should be, integrated into the broader body of international law. At one end of this spectrum is the view that the WTO and its dispute settlement system is essentially a closed system that is independent of public international law rules and principles. This view is critical of the Appellate Body's use of extraneous legal rules and obligations to interpret the WTO texts. At the other end of the spectrum is the view that WTO dispute settlement system is essentially a court of "general jurisdiction" that may enforce a variety of legal rights and obligations in addition to those specifically set out in the WTO Agreements. This paper suggests a middle view, that while non-WTO legal rules may be used when interpreting and applying WTO provisions, the specific and circum-

¹Appellate Body Report in *United States – Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996 (WT/DS2) [hereinafter *US - Gasoline*] at page 21.

scribed mandate and jurisdiction of WTO adjudicating bodies do not extend so far as to permit them to enforce other international treaties. Even if not *applied or enforced* and, therefore, not strictly a direct source of WTO obligation, non-WTO treaties, practices, customs and general principles of law may be relevant in the *interpretation* of WTO provisions and, therefore, can become fairly influential in defining the parameters and the content of WTO obligations.

The WTO is not a Closed System

IT is clear from the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) and from WTO jurisprudence that the WTO is not a closed system impervious to other sources of international law. A number of factors support this conclusion. First, the existence of environmental, health, social, security and other exceptions to WTO obligations links the WTO with other systems of law and policy. The fact that exceptions, such as Article XX of GATT 1994, fail to provide Members, panels and the Appellate Body with detailed criteria for judging trade and environment disputes does not permit these bodies to avoid their adjudicative responsibilities.

Obligated to adjudicate disputes, even when this involves interpreting the most obscure provisions of the WTO Agreement, and obliged to do so in an “objective manner” (Article 11 of the DSU), panels and the Appellate Body have no alternative than to look for information that will lead them to the reasonable and objective meaning of the terms of the treaty that they must ultimately interpret, apply and enforce. The scarcity of information within the WTO agreements, such as when these deal with environment issues, necessarily obliges the honest and objective interpreter to take into account any relevant information, even when this is from outside the WTO provisions themselves.

Second, Article 3.2 of the DSU requires the WTO agreements to be interpreted in light of customary rules of interpretation, and the Appellate Body has stated² that these agreements must not be inter-

²Ibid.

preted in clinical isolation of public international law. This reference to the massive body of rules existing in public international law cannot be denied.

Third, it can be argued that Article 31 of the Vienna Convention, as discussed below, in certain cases *requires* any interpretative body, such as panels and the Appellate Body, to use or to take into account various non-WTO legal materials and facts when interpreting WTO obligations.

Fourth, the WTO Agreement preamble commits WTO Members to make “optimal use of the world’s resources in accordance with the objectives of sustainable development”. The objective of sustainable development can only be understood in the light of contemporary law and policy defining and supporting this goal. In this context, it may be worth noting the Marrakesh Decision on Trade and Environment, in which WTO Members took note of the Rio Declaration on Environment and Development, and which provides parameters for the concept of sustainable development.

Finally, if its agreements are interpreted and developed in isolation from the rest of international law, the WTO would risk coming into formal “conflict” with other international rules, contrary to the general international law presumption against conflicts and in favour of the effective interpretation of treaties.

The WTO is not a Court of General Jurisdiction

WHILE it is clear that the WTO is not impermeable to other legal rights and obligations, Articles 1, 7 and 11 of the DSU suggest that the WTO dispute settlement system has a limited mandate. Pursuant to Article 1 of the DSU, the DSU shall apply to disputes brought under the “covered agreements” listed in Annex 1 of the DSU. Article 7 provides:

“Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: *To examine, in the light of the relevant provisions in (name of the covered*

agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

2. Panels shall address the relevant provisions *in any covered agreement or agreements* cited by the parties to the dispute. ...(emphasis added)”

Article 7(2) seems to limit a panel’s terms of reference to the “covered agreements” which are defined in Annex I of the DSU to include only the WTO agreements. Article 11 of the DSU also suggests a limited jurisdiction for panels. It requires a panel to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the *applicability of and conformity with the relevant covered agreements*, and make such other findings as will assist the DSB in making the recommendations or in giving the *rulings provided for in the covered agreements*.” (emphasis added)

The limited jurisdiction of WTO adjudicating bodies has, arguably, been confirmed by the Appellate Body in *EC - Poultry*, where it had to assess the legal value of a bilateral agreement (the Oilseed Agreement) between Brazil and the EC. The Appellate Body stated:

In our view, it is not necessary to have recourse to either Article 59.1 or Article 30.3 of the *Vienna Convention* ... As such, it [the Schedule of the EC] forms part of the multilateral obligations under the *WTO Agreement*. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC - Oilseeds*. As such, the Oilseeds Agreement is not a “covered agreement” within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT

1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*, the Oilseeds Agreement is not one of those legal instruments.³

In all cases, the only jurisdiction of panels and the Appellate Body is that defined in the DSU, because they are a creation of the WTO and the DSU and they do not have any independent existence outside the WTO and the DSU. Under the DSU, only provisions of the “covered agreements” can be the “applicable law” applied and enforced by panels and the Appellate Body.⁴

While we suggest that the WTO should not independently enforce non-WTO rules, it may, in certain cases, enforce outside sources of law where these are explicitly referred to in the WTO texts and when such action is mandated by the terms of the WTO provisions; such outside source of rights and obligations would be enforced as WTO provisions (and through WTO provisions).

The TRIPS Agreement, for example, incorporates into its text obligations arising in a series of pre-existing intellectual property treaties. Article 2 states “[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19 of the Paris Convention (1967)”. The provisions of the Paris Convention, and the rights and obligations arising thereunder, have thus been explicitly cited in the TRIPS Agreement as WTO obligations. Incorporated into the fabric of the TRIPS Agreement, panels and the Appellate Body would apply these provisions as WTO obligations.⁵

³Appellate Body Report on *European Communities – Measures Affecting the Importation of Certain Poultry Products*, adopted on 23 July 1998 (WT/DS69) [hereinafter *EC – Poultry*], at para.79.

⁴In this paper we have deliberately avoided any discussion of non-violation claims.

⁵An interesting issue is to what extent the terms of reference allow panels to introduce practices developed in WIPO into WTO law. On the situation of the “minor exceptions” practices of the Berne Convention as an “acquis” developed in the WIPO forum and exported into WTO law see the Panel Report on *United States – Section 110(5) of the US Copyright Act*, adopted on 27 July 2000, (WT/DS160/R) at paras 6.30 to 6.82.

WTO Adjudicating Bodies can/must use Non-WTO provisions to Interpret WTO provisions

Outside obligation to define or delimit a WTO obligation

A non-WTO obligation may be explicitly referenced *to define or delimit* an obligation whose locus is within a WTO agreement. This is often the case when, pursuant to Article IX of the Agreement Establishing the WTO, Members adopt a waiver referring to another outside treaty (or set of obligations) to justify or explain the purpose, object and scope of the WTO waiver. This situation arose in *EC - Bananas III*, where the Panel and Appellate Body examined the Lomé Convention to determine the scope of a Lomé waiver granted to the European Community with respect to certain of its obligations under the GATT 1947. Here, the Appellate Body upheld the Panel's statement that:

...since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, *we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.*⁶ (emphasis added)

In the dispute on *Korea – Various Measures on Beef*⁷, the Panel considered it necessary to examine a series of prior bilateral agreements between the parties in dealing with the said remaining restrictions in order to interpret the term “remaining restrictions” in Korea's Schedules.

Non-WTO rules are also used in the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS) Agreements⁸ and the General Agree-

⁶ Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27 [hereinafter *EC- Bananas III*], at para 167.

⁷ Panel Report on *Korea – Measures Affecting Imports of Fresh Chilled and Frozen Beef*, on appeal but not on this issue (WT/DS161,169).

⁸ Article 3.2 of the SPS Agreement and Article 2.4 of the TBT Agreement.

ment on Trade in Services (GATS)⁹ when these agreements refer to international standards bodies and norms. The international norms and standards referred to in these WTO agreements are to be used by Members as a “basis” for their own domestic norms and measures.¹⁰ These non-WTO international standards *are not applied or enforced as such* by WTO adjudicating bodies but are only used to assess the reasonableness of the respective domestic norms. At best, national regulations complying with such international norms benefit from a presumption of WTO compatibility.

Customary rules of interpretation of public international law

Panels and the Appellate Body are required by Article 3.2 of the DSU to use “customary rules of interpretation of public international law” to interpret the provisions of the WTO agreements. What are those customary rules of interpretation of public international law?

The Appellate Body confirmed that Articles 31 and 32 of the Vienna Convention are relevant when interpreting the WTO agreements. It is not yet clear what other provisions of the Vienna Convention could be considered to represent customary international law rules of interpretation for the purpose of the WTO Agreement. For instance, the Appellate Body in *Desiccated Coconut*¹¹, *EC – Bananas*¹² and *Canada – Patent Protection*¹³, and the Panel in *Hormones*¹⁴, referred to Article 28 of the Vienna Convention in denying the retroactive application of treaties. In *Poultry*, the Appellate Body declined to use Article 30 on the successive application of treaties.¹⁵ However, in the *Hormones* Arbitration Report issued under Article 22.7 of the DSU, the arbitrators made use of Article 30

⁹ Article VI:5(b) GATS.

¹⁰ See the statement of the Appellate Body in *European Communities – Measures Concerning Meat and Meat products (Hormones)*, adopted on 13 February 1998 (WT/DS26,48) [hereinafter *EC – Hormones*, paras.160-168, with regard to the relevance of international standards.

¹¹ Appellate Body report on *Brazil – Measures Affecting Desiccated Coconut*, adopted on 20 March 1997 (WT/DS22/AB) p.15.

¹² *EC – Bananas III*, para. 235

¹³ Appellate Body Report on *Canada – Term of Protection*, adopted on 12 October 2000, (WT/DS170/7) at para. 71 to 74.

¹⁴ Panel Reports on *EC - Hormones*, US Panel Report, para. 8.25 and Canada Panel Report, para. 8.28. The Panel Reports were upheld on this issue.

¹⁵ *EC - Poultry* at para. 79.

of the Vienna Convention on the successive application of treaties.¹⁶ Strictly speaking, the provisions on the interpretation of treaties are mentioned in Articles 31, 32 and 33 of the Vienna Convention. However, Article 31.3(c) of the Vienna Convention obliges an interpreter to take into account all other relevant and applicable rules of international law. This would therefore include many customs, general principles of laws, and treaties, including, in certain circumstances, provisions of the Vienna Convention.

In addition to provisions contained in the Vienna Convention, Panels and the Appellate Body have also referred to certain general principles of interpretation, such as the principle of effective interpretation¹⁷, the presumption against conflicts¹⁸ and the interpretative principle of *in dubio mitius*.¹⁹

What, then, are the implications for panels and the Appellate Body to being obliged to respect such customary rules of interpretations, in particular, those rules mentioned in Articles 31 and 32 of the Vienna Convention, when interpreting the WTO agreements?

THE USE OF NON-WTO PROVISIONS PURSUANT TO ARTICLES 31 AND 32 OF THE VIENNA CONVENTION

Article 31.1 of the Vienna Convention requires the WTO Agreement, as with any other treaty, to be interpreted according to the

¹⁶ *EC - Hormones* Arbitration Report (WT/DS26/AB/R), 12 July 1999.

¹⁷ See, for instance, *US - Gasoline*, at p.23; Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, Adopted 1 November 1996 (WT/DS8,10,11) ("*Japan - Alcoholic Beverages*"), p. 12; Appellate Body Report on *United States - Restrictions on Imports of Cotton and Man-Fibre Underwear*, adopted on 25 February 1997, WT/DS24/AB/R, p. 16; Appellate Body Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ("*Argentina - Textiles*") adopted on 22 April 1998 (WT/DS 56/AB/R), paras. 82 to 86; Appellate Body report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted on 12 January 2000, (WT/DS98/AB/R) para. 81.

¹⁸ *Guatemala - Anti-Dumping Investigation regarding Portland Cement From Mexico*, adopted on 25 November 1998, WT/DS60/AB/R, para. 65. *Indonesia - Measures Affecting the Automobile Industry*, adopted on 23 July 1998 (WT/DS54,55,59,64), para. 14.28 ff.

¹⁹ Appellate Body report on *EC - Hormones*, footnote 154. "The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."

ordinary meaning of their text, read in context, and in light of its object and purpose. Article 31.2 describes what can be considered as “context”. Article 31.3 mandates that actions taken by the parties following the conclusion of the treaty. Article 31.3(c) extends further, requiring consideration of “any relevant rules of international law applicable in the relations between the parties.” Arguably, this provision aims to promote “coherence” in the interpretation of treaty obligations, so that the treaty and other relevant international law rules are interpreted in a way that is mutually supportive and avoids conflict, in compliance with the international law presumption against conflicts.

Together, Articles 31 and 32 of the Vienna Convention offer the following six bases for any objective interpreter, such as Panels and the Appellate Body, to refer to general principles of international law, other legal instruments or acts when interpreting WTO provisions:

- any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty (forming part of the context, Article 31(2)(a));
- any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty (forming part of the context, Article 31(2)(b));
- any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (to be taken into account together with the context, Article 31(3)(a));
- any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (to be taken into account together with the context, Article 31(3)(b));
- any relevant rules of international law applicable in the relations between the parties (to be taken into account together with the context, Article 31(3)(c));

- supplementary means of interpretation including, for example the preparatory work of the treaty or a legal instrument forming the “circumstances of the conclusion of the treaty under interpretation (pursuant to Article 32).

So far, Panels and the Appellate Body have not always been explicit about which provisions of Articles 31 or 32 they are invoking. For instance, in *EC - Computer Equipment*, the Appellate Body criticized the Panel for not having considered the International Convention on the Harmonized Commodity Description and Coding System and its Explanatory Notes, although this was not a covered agreement of the WTO.²⁰ The provisions of Article 31.2(a)(b) and 31.3(c) of the Vienna Convention were therefore relevant. The Appellate Body went on to state that “the purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but, it is clearly of more limited value than the practice of all parties”.²¹ The Appellate Body also stated that the Panel should have examined the “subsequent practice” of the parties.²² Subsequent practice must be considered by Panels and the Appellate body under Article 31.3(b). In referring to past practice, Article 32 would be the applicable provision as it refers to circumstances surrounding the conclusion of the treaty.

In *US - Shrimp*, the Appellate Body used a variety of non-WTO international rules to interpret WTO provisions. The Appellate Body examined the use of the term “natural resources” in a number of international conventions.²³ It referred to other international conventions when interpreting the reference to ‘sustainable development’ in the Preamble of the WTO Agreement.²⁴ It also referred to international (and regional) treaties when assessing whether the US

²⁰ International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on 14 June 1983.

²¹ Appellate Body Report on *European Communities — Customs Classification of Certain Computer Equipment*, adopted on 5 June 1998 (WT/DS62, 67, 68) [hereinafter *EC - Computer Equipment*] at para. 93.

²² *Idem* at para. 90.

²³ Appellate Body Report on *US - Import prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), adopted on 6 November 1998 [hereinafter *US - Shrimp*] at para. at para. 127 to 134.

²⁴ *US - Shrimp* at para. 154.

measure had been applied in a manner amounting to unjustifiable discrimination, in particular, concerning the way consultations had been conducted and ought to be conducted under other international conventions.²⁵ This was somewhat of an effort to trace the practice of states under other international treaties (arguably pursuant to Articles 31.2(b) and Article 32 of the Vienna Convention) with regard to the need to perform across the board consultations.

In this context, it is worth recalling that the Appellate Body acknowledged that the interpretation of a treaty can be affected by subsequent developments in international law, including, arguably, new customs, general principles of law and treaties.

EVOLUTIONARY INTERPRETATION

Reference has also been made in WTO jurisprudence to the principle of evolutionary interpretation, which is no more than a reference to the doctrine of “inter-temporal law “. In *US – Shrimp* the Appellate Body stated:

From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather “by definition, evolutionary”.²⁶

The ordinary meaning of a treaty’s terms should reveal the parties’ common intent at the time that the treaty is concluded. However, provision is made in Article 31.3 of the Vienna Convention for a consideration of actions subsequent to the conclusion of a treaty as authentic aids to interpretation. Paragraph 3(a) refers to any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, while paragraph 3(b) of Article 31 refers to any subsequent practice that constitutes the agreement of the parties regarding its interpretation. In the context of Article 31.3(c), Sinclair stated that:

there is some evidence that the evolution and development of international law may exercise a decisive influence on the

²⁵ Ibid. at para. 166 to 176.

²⁶ Ibid, para.130

meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as ‘public policy’ or ‘the protection of morals’.²⁷

The International Court of Justice has also made use of an “evolutionary” approach in certain cases,²⁸ including most recently in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* where it stated: “[The] Treaty is not static, and is open to adapt to emerging norms of international law.”

In the NAFTA context, an Arbitration Group recently concluded that the use of the term “GATT” in the cross-reference from the provisions of the FTA and NAFTA had to be interpreted to mean GATT as it evolved into the WTO Agreement.²⁹

Finally, it should be recalled that the conclusion of subsequent treaties relating to the subject-matter(s) covered by a previous treaty may be evidence of state practice, itself a source of interpretation pursuant to Article 31.3(b). As further developed below, it can be argued that such a subsequent treaty should also be taken into account pursuant to Article 31.3(c).

THE USE OF ARTICLE 31.3(C) TO ASSIST IN THE INTERPRETATION OF WTO AGREEMENTS

Article 31.3(c) of the Vienna Convention provides that “There shall be taken into account, together with the context: (...) (c) any relevant rules of international law applicable in the relations between the parties”.

²⁷ Sinclair, I., *The Vienna Convention on the Law of Treaties*, 2nd ed., (1984, Manchester, MUP) p. 139

²⁸ See *Namibia (Legal Consequences) Advisory Opinion* (1971) ICJ Rep. 31. In *US – Shrimp*, the Appellate Body also quoted Jennings and Watts (eds.), *Oppenheim’s International Law*, 9th ed., Vol. I (Longman, 1992), p.1282 and E. Jimenez de Arechaga, “International Law in the Past Third of a Century”, (1978-I) 159 *Recueil des Cours* 1, p. 49. See also Mustafa Kamil Yasseen, “L’Interpretation des traités d’après la Convention de Vienne sur le droit des traités”, *Recueil de Cours*, 1976 – III, tome 151, p. 64, and T.O. Elias “The Doctrine of Inter-temporal Law”, *AJIL*, Vol. 74, (April)1980, p.292.

²⁹ Arbitral Panel Established Pursuant to Article 2008 of the North-American Free-Trade Agreement, Final report: *In the Matter of Tariffs Applied by Canada to Certain U.-U.-Origin Agricultural Products* (2 Dec. 1996).

Several associated points can be made. First, the term “any relevant rules of international law” seems to provide a wide mandate to examine public international law. Already, in *US - Shrimp*, the Appellate Body stated that “our task here is to interpret the language of the chapeau, *seeking additional interpretative guidance, as appropriate, from the general principles of international law*”.³⁰ (emphasis added) In *EC - Hormones*, the Panel stated “To the extent that this principle [precautionary] could be considered as part of customary international law *and be used* to interpret Articles 5.1 and 5.2...”.³¹ It can be argued that when interpreting WTO provisions, Panels and the Appellate Body are obliged to “take into account” a broad range of relevant rules of international law including treaties, customary rules, and general principles of international law - in fact, all sources of international law as defined by Article 38 of the Statute of the International Court of Justice.

Second, in the absence of further instructions from WTO Members, the determination of what rules are “relevant” would need to be made on a case-by-case basis by examining criteria, such as the subject of the dispute and the content (subject matter) of the rules under consideration. The size of the membership of a non-WTO treaty cannot be the single decisive criterion. For instance, a treaty signed by a limited number of countries, say, on the control of a specific disease that exists in only these countries, would remain “relevant” to a dispute that involves trade measures taken in the context of the control of that disease. Another more sophisticated criterion such as the *potential membership* of a non-WTO rule may be preferred, as this will refer to a norm that is, potentially, accepted by the international community. In this context, it is worth noting that paragraph 3 of Annex A of the SPS Agreement, Articles 4 and 5 of the TBT Agreement and Article VI:5 of the GATS refer to standards developed in relevant international (or even regional) organizations as being those organizations whose membership is *open to* all Members of the WTO.

Third, after the relevant rules have been identified, a question would then remain as to which of these rules are “applicable in the relations between the parties”. How might this term limit the rel-

³⁰ *US - Shrimp*, at para.158.

³¹ Panel Report in *EC - Hormones (US)*, para. 8.157.

evant rules that are available as interpretive material? There are at least three possible interpretations.

- One narrow interpretation would read “parties” as meaning all WTO Members. Few international agreements, if any, will have identical membership, although some may have a wider membership. But to request that such a non-WTO treaty should have at least the WTO membership would also create illogical situations. As the membership of the WTO increases, fewer international agreements will match its membership. This would lead to the paradoxical result that the WTO would, at least in theory, become more isolated from other international systems of laws as its membership grows. From a legal perspective, the “identical membership” approach (in relation to the WTO membership) does not seem to be consistent with that adopted by the Appellate Body in *Shrimp*, which examined CITES and a number of other multilateral environment agreements (“MEAs”), many of which did not have the same membership as the WTO.
- A second, broader interpretation of the terms “applicable in the relations between the parties” would allow the use of treaties between a smaller or different group – more than one WTO Member, but less than the whole WTO membership – to interpret WTO obligations. This interpretation is supported by the different usage of “parties” throughout Article 31 and in Article 31.3(c). Article 31.2(a) refers to “any agreement relating to the treaty which was made between *all the parties*”, and Article 31.2(b) refers to an instrument by “*one or more parties*” and accepted by “the *other parties*”. Therefore, it could be argued that the use, without these qualifications, of the term “the parties” in 31.3(b) and (c) is basis for a consideration of treaties signed by a subset of the WTO membership that is smaller than that of all the Members, but more specifically by a subset of all the parties to the treaty being interpreted, i.e. the specific countries the relations of which are under examination in the light of the treaty at issue.
- Third, it may be asked whether a treaty signed by only *one* of the parties to a dispute could be considered “a relevant rule of

international law applicable *in the relations between the parties*”? The acceptance by one party of an outside treaty may provide some, albeit more limited, assistance in interpreting WTO obligations. In *Computer Equipment*, the Appellate Body stated that “the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties”.³² In any case, the fact that one party to a WTO dispute has signed another treaty relevant to the WTO dispute can constitute a legal fact relevant to the matter at issue. For instance, when invoking an Article XX exception, a Member may use its participation in another treaty on the same subject-matter as evidence of its good faith.

Finally, it should be emphasized that Article 31.3(c) requires panels and the Appellate Body to “take into account” any relevant rules and, not to impose, apply or enforce these non-WTO rights and obligations. Rather, the purpose is to take them into account, where relevant, to interpret the WTO rights and obligations to ensure that the WTO subsystem of international law develops coherently with other systems of law in light of the international principle of interpretation against conflicts, as well as for effective interpretation.³³ Essentially, the weight and value to be given to those non-WTO provisions would be left to each interpreter on a case by case basis.

An Example: The use of MEAs, under Article 31.3(c), in the interpretation of Article XX of GATT

Many environmental treaties have implications for international trade. At least three of them, the Montreal Protocol, CITES and the Basel Convention impose an obligation on their parties to ban the import of various substances from countries that are not parties to these treaties.

That types of MEAs could be used as “relevant rules of international law applicable in the relations between the parties” to interpret WTO obligations under Article 31.3(c) is a complex issue that

³² *EC - Computer Equipment* at para. 93.

³³ On the issue of GATT as a subsystem of international law, see Pieter Jan Kuijper “The Law of GATT as a Special Field of International Law” *Nthd.Y.Int’l.L.* (1994), p.227.

involves factual and legal considerations. It is thus useful to examine the practical situations in which a Panel or the Appellate Body might be requested to interpret WTO obligations, such as Article XX, in light of the provisions of a MEA, and how Article 31.3(c) could be used.

Six main situations can be envisaged: First, a set of cases involving a MEA adopted by both disputants and (1) where the disputed measure is *required* by a MEA; (2) where the disputed measure is not required, but is *explicitly permitted*; (3) where the disputed measure is *taken in furtherance* of the goals of a MEA. A second set of cases involves a MEA that has *not* been adopted by both disputants and (4) where the dispute measure is *required* by a MEA; (5) where the disputed measure is not required, but is *explicitly permitted*; (6) where the disputed measure is *taken in furtherance* of the goals of a MEA.

SITUATIONS INVOLVING A MEA ADOPTED BY BOTH DISPUTANTS

- First, the creation of a MEA with a broad membership could arguably provide a strong indication that a genuine environmental problem exists, and that the international community has agreed that a certain response is required. In some cases, it may indicate that the international community has agreed that, in certain prescribed circumstances, trade measures are a justifiable response to the risk of environmental harm. Therefore, it can be suggested that in a situation where a MEA *requires* certain trade measures between its parties (an initial legal fact to be determined) - and these parties are also WTO Members - there is the potential for a “conflict” between the obligations under the respective MEA obligations and those of the WTO (e.g. the Article XI prohibition against import bans). In this context, it can be argued that Article XX should be interpreted by taking into account the presumption against “conflicts”. This presumption suggests that potential conflicts should be resolved by interpreting the action taken pursuant to the MEA, binding both disputants, as *prima facie* compatible with Article XX. In other words, it could be argued that a trade measure required by the terms of the MEA would be “presumed” to satisfy the requirements of Article XX. The obligation contained in Article 31.3(c) to take into account other “rules

of international law applicable to the parties” recognizes that such conflict with other treaties should be avoided in the interpretation of the treaty under examination.

- Second, a MEA may still be relevant where trade measures are not required, but are, by contrast, *explicitly permitted* by the MEA. Here, the interpreter is not faced with a situation of strict conflict between the WTO prohibitions (say, against quantitative restrictions) and the requirements of the MEA, since there are no such requirements. This is, rather, a situation where the “effective interpretation” of treaty provisions should lead the interpreter to conclude that the measure *explicitly permitted* under the MEA satisfies the provisions of Article XX. The principle of effective interpretation ensures that no provision of a treaty is left without any effect or becomes a “nullity”.³⁴ To interpret the GATT/WTO as nullifying rights negotiated under other treaties, such as under those provided for in a MEA, would violate the principle of effective interpretation, which ensures that the ordinary meaning of all terms of a treaty are given their full meaning. A trade restriction explicitly permitted by a MEA could therefore be argued to be presumed to satisfy the requirements of Article XX.
- Third, where the measure challenged is not required, or explicitly permitted, but is a measure that a party claims is taken *in furtherance* of the goals of the MEA, the situation is more complex. Nonetheless, that MEA may still constitute a “relevant rule of international law” that, in some circumstances, a panel will be obliged to take into account when interpreting and applying the provisions of Article XX for a specific WTO Member. That the international community has identified an environmental problem as sufficiently serious to warrant an international response lends weight to a claim that a measure that furthers its goals is based on environmental motivations. The fact that the said measure is applied in accordance with the framework set out in that MEA can also be of some relevance in assessing whether the measure was applied in compliance with the provisions of the chapeau of Article XX, since

³⁴ *US - Gasoline*, at page 18.

the function of the panel is to assess whether the measure is adopted for environmental considerations and is applied without being a disguised restriction on international trade.

It is important to recall that Article XX permits certain unilateral actions to be taken to promote environmental goals, even in the absence of a MEA on the subject matter. It would be illogical if a WTO Member acting in furtherance of the goals of a relevant MEA (and party to such an MEA) were to be placed in a worse position than if no such MEA existed. This assessment will be a factual one and will depend on the specific measure at issue and the specific provisions of the MEA at issue. This was the situation in which the United States and the complainant parties (all CITES signatories) found themselves in the *Shrimp* dispute. The US claim that its measure was adopted in furtherance of CITES goals was considered by the Panel and the Appellate Body but the US measure was considered to be discriminatory and a disguised restriction on trade and therefore did not comply with the provisions of the chapeau of Article XX.

SITUATIONS INVOLVING A MEA THAT HAS *NOT* BEEN ADOPTED BY BOTH DISPUTANTS

- Questions arise where one of the parties to the dispute is *not* also a party to the MEA concerned with the subject-matter covered by the measure for which Article XX is invoked. While there have so far been no challenges to trade measures used in MEAs, the most likely WTO challenges to such measures will come from a WTO Member non-party to that MEA that becomes subject to a trade ban imposed by a WTO Member pursuant to a MEA. Here, the MEA would have less value in the interpretation of WTO rules than, say, a treaty to which both (or all) WTO Members are parties. In *Computer Equipment* the Appellate Body stated that the practice of only one Member was relevant when interpreting a WTO provision.³⁵ Where the disputed measure is *required* by the MEA, the panel should

³⁵ *EC - Computer Equipment* at para. 93.

favour an interpretation that avoid clashes of obligations for one party without denying the rights (market access) of the other party.

- Where the disputed measure is not required, but is *explicitly permitted*, or
- Where the disputed measure is *taken in furtherance* of the goals of a MEA, the existence and content of such a relevant MEA could always be used as factual elements in helping the panel or the Appellate Body to assess whether the measure at issue and its application are consistent with the prescriptions of Article XX. As mentioned above, since Article XX permits certain unilateral actions to be taken to promote environmental goals even in the absence of a MEA on the subject-matter, it would be illogical if a WTO Member acting in furtherance of the goals of a relevant MEA were to be in a worse position than if no such MEA existed.

THE MEA AS FACTUAL EVIDENCE TO BE USED IN THE INTERPRETATION OF ARTICLE XX

In all the above mentioned situations, and in particular those mentioned in (3), (4), (5) and (6) (where it may be legally more difficult to argue that an action taken pursuant to a MEA would benefit from a presumption of consistency with Article XX), the existence of a MEA could be used as part of the *factual analysis* of the circumstances of a dispute and the reasons why a Member adopted that particular trade measure and why it applied it in that manner. This examination should occur as part of a case-by-case analysis of the facts of the case. For instance, reference to, or compliance with, an MEA could be used as one of the elements in establishing that discrimination in the application of the measure should not be characterised as “unjustifiable,” or that its application was not a “disguised restriction on international trade” for the purposes of the Article XX chapeau. The issue would be whether the content of the MEA has been so widely accepted as to provide sufficient evidence that the challenged Member has acted in a justifiable manner.

In *US - Shrimp*, for instance, the Appellate Body referred to the United States’ “behaviour” under other treaties (the Inter-Ameri-

can Convention) in order to conclude that its actions - with regard to India, Thailand, Pakistan and Malaysia - constituted unjustifiable discrimination.³⁶ Reference to other international treaties could serve to explain the historical or factual context in which a Member found itself, as well as the background that may explain either the policy basis of a measures or the manner and circumstances of its application.

As mentioned previously, compliance with a non-WTO treaty can also be viewed as evidence of state practice, even if this is the practice of one party only, which is relevant when interpreting whether that particular Member is covered by the provisions of Article XX of GATT.³⁷

Such examination of each MEA, on a case by case basis, cannot be done without keeping in mind the fundamental conclusion of the Appellate Body with regard to the need to ensure that some *flexibility* is left to all sovereign countries for complying with the policy requirements authorized under the subparagraphs of Article XX. The respect of such flexibility ensures that the application of the measure at issue is always done with the object of ensuring that the policy pursued is really one of the policies contained in the relevant subparagraph of Article XX and is not a disguised restriction on trade.

CONCLUSION

Finally, the above proposals, (in particular the situations referred to in paragraphs (1) and (2) for measures required or explicitly permitted by the MEA), according to which the interpretation of Article XX should be undertaken in such a manner as to ensure the avoidance of conflict and to ensure the effectiveness of relevant MEAs, should not be understood as setting aside the two-tier stage test set out by the Appellate Body in *US - Gasoline* for the interpretation of Article XX. Rather, in certain circumstances, the existence of such a MEA, and the measures taken in compliance with such a MEA, would lead to a presumption that the measure is necessary for the protection of health (Article XX(b)) or that it relates to the

³⁶ *US - Shrimp* at paras. 169 to 176.

³⁷ *EC - Computer Equipment* at para. 93.

conservation of natural resources (Article XX(g)) and that the measure has not been applied in a discriminatory manner or as a disguised restriction on trade. Of course, the more detailed the MEA is with respect to the enforcement of such a type of measure, the stronger the argument that such a detailed MEA is evidence of a consensus among the two parties, or even of an international consensus on that matter.

General principles of international law as “Adjuvant”³⁸ to interpreting, Enforcing and Applying WTO Law

PANELS and the Appellate Body have also made use of general principles of international law to support their interpretation based on the ordinary meaning of the terms of the WTO Agreement. For instance, in *Canada – Terms of Protection*, in discussing the non-retroactivity of some provisions of the TRIPS Agreement, the Appellate Body stated that: “This conclusion is supported by the general principle of international law ... which established a presumption against the retroactive effect of treaties”.³⁹ In *US – Shrimp* it stated that: “The chapeau of Article XX is, in fact, but one expression of the principle of good faith”.⁴⁰

WTO adjudicative bodies have also made reference to and have applied general principles of law with a view to ensuring the effectiveness of the adjudication process. In *EC – Bananas III*, the Appellate Body rejected the GATT practice of refusing private counsel before panels and stated that: “... we can find nothing in the [“WTO Agreement”], the *DSU* or the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the compo-

³⁸ The term “adjuvant” was suggested by Pieter Jan Kuijper for situations in which principles of international law are used as “catalysts”, to “facilitate” and to some extent to “confirm” the interpretation reached by the WTO adjudicative bodies in performing their functions.

³⁹ Appellate Body report on *Canada – Term of Protection*, (WT/DS165/AB), adopted on 12 October 2000, para. 71

⁴⁰ Appellate Body report on *US – Shrimp*, para. 158

sition of its delegation in Appellate Body proceedings”.⁴¹ The Appellate Body used the same technique when, in *US – Shirts and Blouses*, it introduced the concept of the burden of proof to WTO law⁴² or when it referred for the first time to “due process” in *Desiccated Coconut*.⁴³

Conclusion

WTO law is a subsystem of international law and, as such, cannot be interpreted, applied and enforced in clinical isolation from other relevant international treaties, customs and general principles of law. The same States have signed the WTO Agreement, human rights treaties, MEAs and other similar agreements. A call for legal coherence between these international rights and obligations was made in the first report of the Appellate Body. Coherence between legal and political systems also poses a challenge to the WTO and the World Bank, as we are reminded daily by dissatisfied parties from a variety of national and societal backgrounds.

⁴¹ *EC – Bananas III*, para. 10

⁴² *US – Shirts and Blouses* at p. 14: “In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.⁴² Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.”

⁴³ *Brazil - Desiccated Coconut* at p. 21: “First, terms of reference fulfil an important due process objective...”. See also the reference to due process in the Appellate Body reports on *EC - Hormones*, para. 154; *India – Patents*, para. 95; *Argentina – Textiles*, para. 79, footnote 68; *EC - Computer Equipment*, para. 70; *Australia – Salmon*, paras. 272, 278.

Regional Integration

MODERATOR: TERESA GENTA-FONS, THE WORLD BANK

Can Regional Integration Survive in a Globalized World ?

BEVERLY M. CARL

*Professor Emeritus of Law
Southern Methodist University
Dallas, Texas, USA*

Introduction

LIBERALIZED trade under the auspices of the WTO, while producing enormous benefits for some, has not benefitted large portions of the world's population. Although 80 percent of the globe's people live in the developing nations, those countries account for only 1/4 of its trade. Twenty four percent of the earth's people subsist on less than one dollar per day.

Flows of grants and concessional lending from the industrialized to the developing world are shrinking.

Industrialized countries are discontinuing or limiting their preferential trade programs for developing countries.

EU expects to revise LOME arrangement significantly. Proposing series of free trade agreements with individual ACP members. Danger here is that weaker African or Caribbean countries could not really compete in a free market with European firms.

SPARTECA (the preferential accord between Australia/New Zealand and the South Pacific Island nations) likely to be discontinued; as now constituted, seems unlikely to endure.

Duty rates under GSP programs are not bound; can be raised without consent of the beneficiaries. Programs like GSP and the Caribbean Basin initiative can be unilaterally removed at any time. Thus, not very attractive to prospective investors.

Margins of preference under these various programs have been rendered almost nil through global tariff reductions.

Thus, it appears that developing countries may expect little assistance from the industrialized world; rather these states will have to depend largely on themselves and their neighbors for future growth.

Role of Integration Units Among Developing Nations

Over 40 regional integration associations now exist, e.g., SADC, COMESA, ANCOM. Development of these could be helpful to the developing world by providing larger markets and economies of scale.

Sustainable solutions may demand that trade measures be re-focused onto countries at similar stages of development.

Such regional groupings, however, also have to cope with the problem of trade diversion.

- These associations could come to reflect in microcosm the same disequilibrium seen on the global level as weaker countries and their companies prove unable to compete with the stronger firms from partner states.
- Moreover, new investments tend to gravitate toward the comparatively more advanced areas, which offer richer, markets and better infrastructure, as well as a hedge should the integration unit someday collapse.
 - a. In Mercosur, a number of Argentine companies, like Goodyear Tire & Rubber Co., have moved their production to Brazil, resulting in an estimated loss of 250,000 jobs in Argentina.

- b. In addition, both federal and local governments in Brazil have been aggressively marketing industrial incentives, such as free land, tax breaks and lower costs for utilities.
- c. Members have undercut their integration units by making trade pacts with outside countries, Mercosur & Mexico; Brazil and ANCOM; Guatemala and Mexico. [This is legally permissible for a free trade association, but not for a customs union or common market, where members are required to apply a “common” external tariff to products from the outside.]
- d. Although expressing reluctance to do so, Tanzania has indicated it will withdraw from COMESA because local manufacturers fear “infant industries would be killed by free competition within the region’s trading” bloc.
- e. The East African Community (Kenya, Tanzania, Uganda) countries also claim they are not yet prepared to operate under free trade arrangement. Concerned about Kenya’s economic dominance, Tanzania and Uganda, asked Nairobi for further concessions. When Kenya refused, the revised EAC treaty was changed to provide only that a future trade protocol should be reached in four years. No firm deadlines for removing tariffs were included.
- f. The Asian financial crisis had a devastating impact on regional trade in Latin America and the Caribbean, resulting in a drop in intraregional exports in 1999 between one fourth and one third.
- g. On the other hand, experts at the Inter-American Development Bank warn that it is necessary to keep in mind the “long term strategic benefits of integration and the importance of preserving the gains already made”.
 - (1) Even in 1998, intraregional trade grew 6 percent for ANCOM, and 14 percent for both the Central American Common Market and the Caribbean Common Market.

- (2) Prior to the Asian crisis, intraregional trade within Mercosur increased by a yearly average of 26% between 1990 and 1996.
- (3) CARICOM sales to CACM during that time grew 20 percent and CARICOM sales to Mexico 13 percent annually.
- (4) Intra COMESA trade jumped from \$1.6 million in 1991 to \$4.2 in 1998.

This backtracking on integration in the developing world is worrisome, but understandable.

The new free market orthodoxy had rejected economic integration as a technique for achieving import substitution at the regional level; rather regional integration was to be used simply as a means to enhance competitiveness and thereby increase global exports.

Exclusive reliance on global markets can backfire.

- The potential for continued export expansion may be curtailed by market saturation and overcapacity. The number of consumers who can afford the plethora of products pouring out of the global economy is limited.
 - a. There is an estimated excess of 18 million automobiles.
 - b. China, Russia and Indonesia are producing more electrical power than the markets can absorb.
 - c. Big industries, like steel and semiconductors, have long grappled with excess.
 - d. Chinese textile factories make enough excess garments to clothe its entire population out of inventory; Thailand suffers from idle golf courses; and South African mines grind out more gold and diamonds than the “bejeweled classes” wish to purchase.

- e. With these surpluses, prices fall. Manufacturers then try to reduce their per unit cost by increasing production. For instance, a Mongolian firm, faced with a slump in the price of cashmere, is building a \$30 million factory that will increase output tenfold.
- f. This pattern is almost universal and spreads across an astonishing range of industries.

Following the trend toward unrestricted markets, these countries typically omitted from their new or revised integration units the compensatory devices that might have assisted their poorer members. Both import substitution and planning mechanisms were vigorously rejected. Weaker economies were no longer accorded special privileges; e.g., Mercosur merely granted Paraguay an extra year to eliminate certain exceptions.

Abandoned were the various techniques which had been previously created to address the problem of polarized growth e.g., transfer taxes, fiscal incentives and concessionary lending to assist their less prosperous members. (Compare the European Union which in the early days did assist its poorer members, like Italy).

Thus, the leading members of these regional groups have concentrated on achieving global competitiveness—Meanwhile, their weaker members have found it difficult—if not impossible—to produce quality goods required by the world market. These poorer states typically gain little from lowering their tariffs to outside competition.

Need for planning at different levels

Regionalism can prove invaluable, if it is structured so that third country producers cannot swamp a region's industries and agriculture.

Protected market integration and regional import substitution could offer an area's producers an opportunity to serve the region's consumers. A common external tariff could be designed to further this goal.

Appropriate technology

- Traditionally, importation of the latest technology has been defended on the ground that it necessary to allow the production of goods competitive on the world market.

- Developing countries and regional organizations need to re-think this policy. Technology which is obsolete in an industrialized nation may be the most appropriate in a poor country. Used technology is cheaper to acquire, thereby absorbing less foreign exchange. Thus, goods manufactured with such “antiquated” technology can be sold to the local populace at lower prices. Older equipment, which tends to be more labor intensive, would create more employment. Regional associations should consider these factors in structuring their import norms and subsidy programs.

Goods could be divided into three categories.

- First would be those intended principally for consumption in the home market. For instance, there is no reason why a poor country need manufacture the latest model TV or refrigerator. For these items, purchases of older or second hand technology might be favored. Likewise, international assistance organization could adopt rules authorizing use of their funds for acquiring appropriate older technology or second hand equipment.
- Next, regional units should identify those products for which there exists a reasonable prospect for world market sales. For these sectors, acquisition of the most modern technology would be justifiable as a competitive necessity.
- Finally, for goods not to be produced in the region, imports might be duty free for essential goods (certain medicines); luxury products might be subjected to high duties, licensing, or exchange restrictions.

Integration with industrialized nations has exerted a strong attraction for some developing countries.

The perception is often, “By integrating with that wealthy country, we will become as rich as they are.” This sanguine attitude overlooks the tendency of private capital to move toward more advanced areas and to abandon the difficult regions.

Now on the world stage are several examples of integration efforts between industrialized nations and developing countries:

NAFTA, EU/Mexico, Canada/Chile, EU/South Africa and the EUROMED trade associations. Before following suit, other developing countries should carefully study those arrangements to comprehend both their costs and benefits, including the impact on domestic companies, indigenous workers, and local farmers.

Impact of the 1994 GATT-WTO Rules on Integration

THE new rules are too rigid for the developing world. Custom unions or free trade areas now appear to be only acceptable forms of integration.

Free trade within a region must be achieved within a “reasonable” time which normally is ten years.

Moreover, barriers must be eliminated on “substantially all the trade”.

As has happened in the past, these norms are proving unattainable for many developing nations.

Reviving the preferential trade association concept would, permit a shift away from the emphases on conventional forms of regional integration toward a more flexible, less ambitious model.

- Establishing fixed rules on how to structure regional agreements would thus be viewed as inappropriate.
- Since the circumstances in countries and regions differ, the goal would be to design “made-to-measure” arrangements. A scaled down, less comprehensive level of economic cooperation could be helpful as point of departure, perhaps eventually leading to economic integration.
- Preferential trading arrangements can offer an open-ended approach to liberalize trade at a pace more acceptable to participating countries. Such a gradualist approach might, for example, begin with agreements on standards, which would remove at least one non-tariff barrier.

The current WTO regime divides developing nations into basically two categories: the LDCs (least developed countries) and other developing nations. Who qualifies as a non-LDC developing country has not been clarified

- A more sophisticated yardstick is needed for these determinations. First, several different categories should be established, e.g., Category A through E. A sliding scale of privileges and exceptions would be applicable to each group. Among factors to be considered might be, not only GNP, but also the total volume of international trade, the “vulnerability index”, and the “capability poverty measure”. In addition, credit could be given for a nation’s efforts to protect the environment, to implement basic labor rights, or to implement effective population control programs. The same would be true for measures intended to achieve a more equitable distribution of income, such as institution of a modern income tax system. In designing these classification standards, the WTO could seek the assistance of other organizations with expertise in such matters, like UNCTAD, UNDP, and the World Bank.
- In special circumstances, a developing nation might be divided into more than one category: for example, the Northeast region of Brazil could be classified differently from the Sao Paulo area.
- Currently, developing countries lose certain benefits or exemptions upon expiration of a fixed time period. Instead of predicated this event upon passage of a set number of years, it should occur when a member graduates into one of the appropriate categories.
- For developing regions, the time period during which free internal trade must be achieved should be extended or eliminated.
- Developing countries and their regional integration associations should be granted the option of not participating in certain WTO agreements, e.g., the TRIMs accord.

- Developing countries and their regional integration associations should be allowed to extend subsidies for promoting a new industry, fostering appropriate technology or encouraging utilization of labor intensive technology; the duration and extent of such subsidies could be made dependent upon the category in which the country or region falls.
- Integration associations within developing regions should be free to use import substitution as a policy tool, as well as a variety of compensatory mechanisms.
- Unbinding tariff rates and increasing duty levels should be permitted for developing countries and their integration associations in carefully delineated situations.
- Developing countries and their integration associations should be allowed to impose quotas on agricultural products when the livelihood of a significant portion of their indigenous farmers is threatened by imports or when required to attain domestic food security.
- Developing country integration groups should conclude agreements establishing the maximum investment and tax incentives to be offered by any member state; lesser levels of incentives could be freely provided

Regional integration and the Environment.

WHENEVER good is sent from one country to another, fossil fuel is consumed, both depleting a non-renewable resource and adding to the pollution of air and sea. We really do need to ask, "Do we really have to eat Chilean strawberries in New York during January?"

Refocusing on the regional level could help in reducing total environmental pollution. Regional economies could be encouraged to furnish the bulk of their physical goods. For example, Iceland grows high quality fruits and vegetables in green houses heated by geothermal energy from her volcanoes.

NAFTA and the Integration Process of the Americas

DR. SERGIO LÓPEZ-AYLLÓN

Research Fellow

Institute of Legal Research

National University of Mexico

Introduction

LATIN America is quite a different place that it was ten years ago. As a result of the change in the economic model and the need for more open trade, Latin American countries gradually began to become integrated into the international economic and trade system, while at the same time competing to attract foreign capital flows. At present, all the countries in the continent are members of the World Trade Organization (WTO)¹ and participate in the various agreements and organizations of multilateral economic cooperation.² At the same time, regional integration stopped being purely rhetorical and was instead expressed in several agreements that have been established or revitalized in recent years.³ The most ambitious initiative is undoubtedly that seeking to create a large area of conti-

¹ See WTO Web Page <http://www.wto.org>.

² See Colas, Bernard, *Global Economic Co-operation. A Guide to Agreements and Organizations*, 2nd. ed., Deventer Boston, Kluwer Law & Taxation Publishers-United Nations University Press, 1994, pp. 510-538.

³ See ALADI, *La nueva realidad de la integración*, Montevideo, Asociación Latinoamericana de Integración, 1997.

mental free trade, the Free Trade Area of the Americas (FTAA), negotiation of which is expected to be completed in 2005. It is worth noting that these integration processes are not one-dimensional. In fact, they constitute the axis around which a set of frequently contradictory economic and political forces revolve.

The negotiation and passage of NAFTA constituted a point of inflection that, for various reasons, modified the horizon of the regional integration agreements. Without attempting to provide an exhaustive account, I shall first point out the features of NAFTA that make it a unique agreement (Section II) so as to be able to analyze its role in the future of the economic and trade integration of the Americas (Section III). I shall conclude that NAFTA is unlikely to serve as an axis around which the process of trade integration in the American continent will revolve. However, the Agreements signed by Mexico under the NAFTA model will undoubtedly mark this process and constitute an inevitable point of reference, regardless of the future of regional integration.

NAFTA as a unique regional integration agreement

NAFTA is, for a number of reasons, an agreement with specific political and technical characteristics. I shall briefly indicate those which I regard as most relevant.

From a political point of view, NAFTA was the first free trade agreement between two of the most developed economies in the world, Canada and the United States, and a less developed country, Mexico. This was possible due to unusual political conditions, and implied a significant change in the way each of the three countries understood its role in the trade and geopolitical relations in the region and the world. The changes had profound implications for the integration of the Americas.

For the United States, first CUSFTA and then NAFTA constituted a reversal of the trade policy towards the regional approach, at least as a complement to "its previous exclusive support of the multilateral approach".⁴ Canada tried to avoid the creation of a "hub

⁴Devos, Serge, "The Multilateral Rules and the New Dimension of Regional Integration: Weaknesses, Need and Scope for more Disciplines" in *Regionalism and Multilateralism after the Uruguay Round. Convergences, Divergences and Interaction*, eds. Paul Demaret, Jean François Bellis and Gonzalo García Jiménez, Brussels, European Inter-university Press, 1997, p. 728.

and spoke" system (with the US being the hub) by adopting a far more aggressive trade policy towards Latin America.⁵ Finally for Mexico, NAFTA represented a radical change of direction in its relation with the United States and, to a lesser extent, Canada.⁶

From the time it was originally proposed, the agreement was conceived as one which would have universal coverage. Moreover, although the asymmetry between the economies was acknowledged, Mexico was not given special, different treatment *per se*, nor were there fiscal transfers in the form of financial aid funds for development. In this respect, NAFTA signified a new type of relation between economies with different levels of development.⁷ As one observer has pointed out:

"the NAFTA approach, of a conventional free trade area supplemented by investment, services and carefully delimited temporary entry provisions (instead of full labor mobility) could prove more flexible in facilitating regional economic integration when countries have different income levels."⁸

⁵See Perret, Louis, "El futuro del libre comercio en el continente americano; la política canadiense" in *El futuro del libre comercio en el continente americano. Análisis y perspectivas*, ed. Sergio López Ayllón, Mexico, UNAM, 1997, pp. 176-177.

⁶See Gutierrez-Haces, María Teresa, "L'État mexicain et les États-Unis: du protectionnisme au libre commerce" in *Le Mexique à l'aube du troisième millénaire*, eds. Marie France Prévôt and Jean Revel-Mouroz, Paris, Institut des hautes études de l'Amérique latine, 1993, pp. 79-104; Serrano, Mónica, "Reflexiones en torno a la iniciativa de una zona norteamericana de libre comercio" in *México frente al umbral del siglo XXI*, eds. Manuel Alcántara and Antonia Martínez, Madrid, Centro de Investigaciones Sociológicas-Siglo XXI, 1992, pp. 123-143.

⁷It should be noted that the "cost" Mexico had to pay to prepare for and adapt to the new circumstances, including the negotiation and implementation of NAFTA, was extremely significant. Without going into details, suffice it to point out that between 1982 and 1995, most of Mexico's internal legal system was modified, particularly as regards economic, trade and financial issues. Thus 164 of the 204 federal statutes (except for Federal District legislation) in force in 1995 were new or substantially modified. In other words, Mexico had to modify nearly 80% of its domestic legal system as a result of the new orientation of the economic growth model and trade liberalization. See López Ayllón, Sergio, *Las transformaciones del sistema jurídico y los significados sociales del derecho en México*, México, UNAM, 1996, pp. 172-223.

⁸Smith, Murray, "The North American Free Trade Agreement: global impacts" in *Regional Integration and the Global Trading System*, eds. Kym Anderson and Richard Blackhurst, New York-London-Toronto, Harvester Wheatsheaf, 1993, p. 85.

Technically speaking, a free trade agreement typically involves the elimination of tariffs and other restrictive regulations of commerce between two or more customs territories.⁹ NAFTA goes well beyond this. Indeed, based primarily on CUSFTA and part of the Dunkel text, NAFTA negotiations produced an agreement of outstanding coverage and technical complexity. Let us examine the reasons for this.

First, with very few exceptions,¹⁰ NAFTA includes all goods, including agricultural goods¹¹ and services. Second, it has a set of extensive, detailed internal disciplines regarding internal procedures. These include customs,¹² safeguards,¹³ technical standards,¹⁴ government procurement,¹⁵ ad/cvd¹⁶ and intellectual property¹⁷ procedures. It also includes special provisions concerning transparency and administrative and legal procedures.¹⁸

Third, and I think that this aspect has hardly been analyzed, NAFTA integrates an investment agreement into a conventional trade agreement for the first time. Strictly speaking, NAFTA is both a trade and an investment agreement combined in a single instrument. This characteristic has important consequences as regards certain goods (e.g. automotive goods) but primarily as regards services since, as we know, commercial presence, the principal form

⁹ Experience shows that most of these agreements do not include all goods and services. See Anderson, Kym and Richard Blackhurst, eds., *Regional Integration and the Global Trading System*, New York-London-Toronto, Harvester Wheatsheaf, 1993, p.5.

¹⁰ The main exceptions are the following: the energy sector for Mexico (Annex 602.3), maritime cabotage and exports controls on logs for the US (Annex 301.3) and cultural industries for Canada (Annex 2106).

¹¹ Exceptions to this rule include dairy, poultry and egg products excluded from the Mexico-Canada agricultural bilateral agreement.

¹² See NAFTA Chapter V Customs Procedures.

¹³ See NAFTA Article 803 and Annex 803.3 Administration of Emergency Action Proceedings.

¹⁴ See NAFTA Chapter IX Standard-Related Measures and Chapter VI Section B Sanitary and Phytosanitary Measures.

¹⁵ See NAFTA Chapter X Sections B Tendering Procedures and C Bid Challenge.

¹⁶ See NAFTA article 1904.15 and Annex 1904.15 Amendments to Domestic Laws.

¹⁷ See NAFTA articles 1714 to 1718.

¹⁸ See NAFTA articles 718, 909, 1019, 1306, 1411, 1604, and Chapter XVIII Publication, Notification and Administration of Laws.

of services trade, implies investment. NAFTA arguably is “the most comprehensive package of services trade and investment liberalization achieved in an intergovernmental trade agreement to date”.¹⁹ The legal consequences of the inclusion of an investment chapter into NAFTA were evident from the time of drafting the agreement.²⁰ In addition to the above, NAFTA also integrated specific disciplines concerning intellectual property. According to a recent survey, Mexico has received between 1994 and 1998 57.2 thousand millions of dollars, 64 % of this amount came from US and Canada.²¹

Fourth, most of the rules of origin in NAFTA respond to the criterion of changes in tariff headings.²² Nevertheless, NAFTA also contains a set of complex and controversial rules of origin applicable to certain sectors, particularly the automotive and textile sectors, which in turn respond to the interests of national industries and the economic characteristics of the region.²³

From an institutional point of view, the Free Trade Commission, comprised of trade ministries, is a consultative and monitoring body, although its decisions must be adopted by the Parties through its internal procedures. The agreement contains three dispute settle-

¹⁹ See Sauvé, Pierre “Regional versus Multilateral Approaches to Services and Investment Liberalization: Anything to Worry About?” in *Regionalism and Multilateralism after the Uruguay Round. Convergences, Divergences and Interaction*, eds. Paul Demaret, Jean François Bellis and Gonzalo García Jiménez, Brussels, European Inter-university Press, 1997, p. 442.

²⁰ See NAFTA article 1112.1 which states: “In the event of any inconsistency between this Chapter (Investment) and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.”

²¹ Von Wobeser, Claus, “El régimen legal de la inversión extranjera en el TLCAN” en *¿Socios naturales? Cinco años del Tratado de Libre Comercio de América del Norte*, ed. por Betriz Leycegui y Rafael Fernández, México, ITAM-M.A. Porrúa, 2000, p. 264.

²² During the NAFTA negotiations, considerable efforts were made to ensure clear and transparent rules of origin.

²³ See Palmeter, David, “Rules of origin in customs unions and free trade areas” in *Regional Integration and the Global Trading System*, eds. Kym Anderson and Richard Blackhurst, New York London-Toronto, Harvester Wheatsheaf, 1993, pp. 330-331; Smith, Murray, *op. cit supra*, pp. 89-94.

ment mechanisms²⁴ to ensure the fulfillment of obligations in the agreement.²⁵ Compliance with the decisions of the dispute settlement panels is subject to certain rules and protection. However, NAFTA did not create bodies of a supranational nature whose decisions directly involve the parties.

Finally, NAFTA and its side agreements include certain aspects of environmental, labor and competition issues, albeit in a limited and incomplete fashion.²⁶ In future, trade negotiations will include these issues, and while insufficient, their resolutions will serve as a useful point of reference.

Beyond these technical aspects, the negotiation of NAFTA constituted an encounter between two distinct legal traditions in an unusually intense interaction. Indeed, while a common language, that of economics, permitted the communication of economic interests, the same could not be said of law. The drafting, but above all, the implementation of the Agreement entailed contact between the com-

²⁴ See Horlick, Gary and Amanda DeBusk, "Dispute Resolution Under NAFTA: Building on the US-Canada FTA, GATT and ICSID" in *Journal of World Trade*, vol. 27, num. 1, 1993, pp. 21-41; Kayami Rosa, Andrew, "Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution" in *Michigan Journal of International Law*, vol. 15, num. 255, 1993, pp. 255-305; an assessment in López, David, "Dispute Resolution Under NAFTA: Lessons from the Early Experiences" in *Texas International Law Journal*, vol. 32, num. 2, 1977, pp. 163-208, Leycegui, Beatriz, "Acordar para disentir: la solución de controversias en el tratado de libre comercio de América del Norte" en *¿Socios naturales? Cinco años del Tratado de Libre Comercio de América del Norte*, ed. por Betriz Leycegui y Rafael Fernández, México, ITAM-M.A. Porrúa, 2000, pp. 537-633.

²⁵ Until July 2000 the three dispute settlement mechanisms have been used (5 chapter XX proceeding (State vs State), 61 binational panels reviews on ad/cvd matters, one Chapter XIX Extraordinary Challenge Committee and 11 Investor-State arbitral panels). In all cases where there has been a decision the Parties have comply with the panel decision. However some difficult cases (e.g. transportation and sugar) are pending of a panel decision. It is worth noting that in light of the volume of trade involved and the significant increase in trade and investment during the last 5 years the number of disputes is relatively small. In fact the dispute settlement mechanisms have been an effective mechanism for preventing disputes between the NAFTA Parties.

²⁶ For an assessment of the labor and environmental institutional aspects see Fernández de Castro and Claudia Ibagüen, "Las instituciones del TLCAN: una evaluación a los cinco años" en *¿Socios naturales? Cinco años del Tratado de Libre Comercio de América del Norte*, ed. por Betriz Leycegui y Rafael Fernández, México, ITAM-M.A. Porrúa, 2000, pp. 487-533.

mon and civil law systems, whose structure, concepts and practice are different. The effect of the contact between these systems permeates the whole text of the agreement and achieves a compromise in several of its institutions. The effect is even more dramatic in view of the fact that, due to the way the reception of agreements operates in the Mexican legal system, these institutions are directly incorporated into Mexican law.²⁷

This encounter between legal systems and cultures is one of the reasons behind the scope and detail of the agreement. Added to the normal distrust concerning the operation and fulfillment of an agreement between the Parties was the accuracy and fondness for detail of Anglo-Saxon legal culture, as opposed to the more general, principle-based style of writing of Latin culture. The result was a text of over two thousand pages, contrasting sharply with other regional integration agreements which are far less lengthy.

The overall detail of NAFTA contrasts sharply with its accession clause, which, technically open to any other country in the world, contains just a few lines. Let us examine the scope of the latter from the perspective of its possible expansion to the south of the continent.

NAFTA and the future of trade integration in the American continent

THE role played by Mexico and NAFTA in the development of regional integration in the American continent can only be understood within a broader process²⁸ that is taking place simultaneously at various levels. The first and most general of these corresponds to the multilateral trade system. The second concerns the complex network of regional integration agreements signed in recent years in the American continent. Finally, the third, as yet only

²⁷ See Fix-Fierro Héctor and Sergio López "Communication Between Legal Cultures: The Case of NAFTA's Chapter 19 Binational Panels" in *The Evolution of Free Trade in the Americas*, ed. Louis Perret, col. *Doing Business Abroad IX*, Montreal, Wilson and Lafleur, 1999, pp. 5-48.

²⁸ For an overview, see CEPAL (Economic Commission for Latin America and the Caribbean), *Panorama de la inserción internacional de América Latina y el Caribe*, Santiago, Comisión Económica para América Latina y el Caribe, 1996.

on the horizon, is the establishment of a Free Trade Area of the Americas, FTAA, scheduled for 2005. We shall examine each of these levels below.

The multilateral trade system

All the countries in the American continent are currently members of the WTO. Consequently, regional trade agreements must be analyzed within the framework of the World Trade Organization rules, from at least two points of view. The first is linked to the consistency of these agreements with multilateral rules, the second to their scope.

Generally, Article 101 of NAFTA declares its consistency with article XXIV of GATT, and in Article 103 the Parties affirm their rights and obligations under the GATT.²⁹

NAFTA is, in effect, a free trade agreement³⁰, signed according to article XXIV³¹ of the GATT.³² Under this article, the three NAFTA Parties notified the GATT that they had signed the agreement, which was subsequently examined by a working party. As in the great

²⁹ The same article established, as a general rule that, in the event of any inconsistency between NAFTA and the GATT, NAFTA shall prevail to the extent of the inconsistency.

³⁰ Theorists of economic integration typically rank the regional integration agreements as follows: preferential trade agreements, or areas (PTAs, in which signatories impose lower tariffs on each other's imports than on imports from third countries); free trade areas, or agreements (FTAs, involving not just lower but zero tariffs between member states, although typically not on all goods and services); customs unions (CUS, which are FTAs, but with the same external trade measures for all member states); common markets (CMs, which allow free movement of factors as well as products between member states); and economic unions (EU, involving not only common factors markets and trade policies but also harmonization of other micro and macroeconomic policies). See Anderson, Kym and Richard Balckhurst, eds. op. cit supra note 9, pp. 4-5.

³¹ GATT Article XXIV is an exception to the Most Favored Nation provision of Article 1 of the GATT. It allows the establishment of free trade areas and customs unions. See Sanpe, Richard, "History and Economics of GATT's Article XXIV" in Anderson, Kym and Richard Blackhurst, eds. op. cit supra note 9, pp. 273-291.

³² See NAFTA Article 101. It should be recalled that the agreement was signed in December 1992, a year before negotiations for the GATT Uruguay Round were completed.

majority of cases³³, this examination did not result in the express recognition of NAFTA's consistency with article XXIV, nor did it suggest that it did not comply with these requirements, leaving a legally ambiguous situation which it shares with most of the integration agreements currently in force. A WTO report notes that:

"Some of the contracting parties have interpreted the lack of recommendations on the subject as meaning that the agreement in question is consistent with article XXIV, while others have interpreted it as meaning that, in view of the lack of a final decision on the contracting parties working collectively on the consistency of a particular agreement with the provisions of Article XXIV, the legal condition of the agreement has not yet been established."³⁴

In practice, since NAFTA's consistency with the multilateral system has not been challenged by any country during a dispute settlement procedure, the agreement can be said to comply with the requirements of Article XXIV, and is a viable model under the multilateral system. However, its scope warrants particular analysis.

Indeed, we have already explained that NAFTA, concluded before the end of the Uruguay Round, has "universal" coverage which includes goods, services, investment, intellectual property, and various dispute settlement mechanisms. The GATT, under whose coverage the agreement was negotiated, was restricted to trade in goods. It was not until the creation of the WTO that the multilateral system coverage included trade in services and certain aspects linked to intellectual property. In other words, multilateral rules concerning these issues were in force only after NAFTA came into effect. Consequently, NAFTA's consistency with some multilateral rules (particularly in relation to Article V of the GATS) was not examined

³³ According to WTO data, by late 1997, notification of 144 regional integration agreements had been given. Until January 1995, the Working Parties had only expressly acknowledged the consistency of these agreements with Article XXIV in six cases. In the remaining cases, the reports had confined themselves to pointing out the divergent opinions of participating members regarding consistency with the agreement in question. See Organización Mundial del Comercio, *El regionalismo y el sistema mundial de comercio*, Geneva, Organización Mundial del Comercio, 1995, pp. 20-21.

³⁴ *Ibidem*, p. 21.

within the WTO. Consequently, certain issues within NAFTA will only be able to be examined in light of multilateral rules through an examination by the WTO of other agreements which, following the NAFTA model, have been negotiated since 1995.

The WTO's expanded coverage has other important consequences, since it establishes a "minimum common denominator" for rules and disciplines applicable to all the organization's member countries. This means that regional integration agreements subsequent to the Uruguay round are only meaningful if they contain rules that enhance liberalization or include sectors which have so far been insufficiently or barely developed within the WTO framework. In other words, NAFTA's viability as a model for regional integration depends on its having a more liberalizing effect than that offered by the rules of the multilateral system.³⁵

It is not possible to offer a detailed comparative examination of the aspects in which NAFTA offers more liberal rules and disciplines than the WTO in this paper³⁶. We shall merely point out certain general aspects that we think will suffice to illustrate our argument in the sense that NAFTA is a model, which, although perfectible, is better and goes further towards liberalization than the rules of the multilateral system, while at the same time being consistent with the latter.

- NAFTA offers a quicker and fuller period of tariff elimination than that proposed at the multilateral level.³⁷
- NAFTA permits broader and fuller liberalization coverage in the service sector.³⁸ In particular, it has more developed liberalization schemes than at the multilateral level in professional

³⁵ It is worth remembering that, as we mentioned earlier (see Section III *supra*), one of the sources of NAFTA was the Dunkel text. In this respect, NAFTA includes most of the disciplines included in the Uruguay Round Agreements.

³⁶ Obviously, due to the characteristics of a regional integration agreements, the latter will have rules that are not necessary in a multilateral context. Such is the case, for example, of rules of origin or bilateral safeguards.

³⁷ We have already mentioned that, with a few limited exceptions, NAFTA includes universal coverage as regards goods trade. See section II *supra*. It also includes special rules for textiles, automobiles, agricultural products and certain energy goods.

³⁸ Both National Treatment and Most Favored Nation Principle are adopted regarding trade in services. The Agreement also provides that no local presence is required to provide covered services.

services³⁹, land transport⁴⁰, telecommunications⁴¹ and financial services.⁴² It is however important to recognize that the level of liberalization achieved and, significantly, these sectors are the more contentious.⁴³

- NAFTA includes aspects linked to investment⁴⁴, including a dispute settlement mechanism for investor-State issues. This permits a better and more efficient scheme for the liberalization of services⁴⁵ and investment-related aspects of trade.⁴⁶
- NAFTA includes specific liberalization rules for government purchases.⁴⁷

³⁹ With respect to licensing and certification of professionals, the Agreement provides that entry requirements should be related solely to competence and endorses a qualified mutual recognition principle.

⁴⁰ In the case of land transportation services, the Agreement provides for cross-border provision of bus and trucking services to be phased in over a transitional period. However this provision has not been implemented between US and Mexico. Mexico has initiated a dispute settlement procedure in this matter.

⁴¹ See NAFTA Chapter 13.

⁴² The Agreement recognizes the right of establishment with respect to banking, insurance, securities, and other financial services, and adopts the National Treatment and Most Favored Nation Principle with respect to financial services generally.

⁴³ The US have initiated a dispute settlement procedure against Mexico under the WTO Dispute Settlement Understanding on the matter of telecommunications. On the NAFTA forum both US and Mexico have requested the establishment of panels in the transborder transportation sector.

⁴⁴ National Treatment, Most Favored Nation and Minimum Standard of Treatment are adopted. It also contains, *inter alia*, rules for transfers, performance requirements, expropriation and compensation.

⁴⁵ Unlike GATS, NAFTA complementary chapters on cross-border trade in services and investment do not take a positive list approach to coverage, but rather apply to all measures affecting trade and investment and not specifically excluded from coverage. The exclusions (i.e. exceptions to investment and cross-border services disciplines) are listed in a set of annexes in the form of negative lists. See NAFTA Annexes I to VII.

⁴⁶ In particular regarding performance requirements. See NAFTA Article 1106

⁴⁷ Although NAFTA government procurement provisions are similar to the Uruguay Round Agreement on Government, this Agreement is one of the GATT plurilateral agreements and its adhesion is not mandatory. The NAFTA is based on a threshold approach. Procurement national treatment obligations are adopted with respect to purchases by government departments or agencies over US\$ 50,000 of goods and services and over US\$ 6.5 million for construction services. With respect to federal government enterprises, these thresholds are raised to US \$250,000 and US\$ 8 million respectively. It also includes provision for transparency and bid-challenge procedures.

- NAFTA has more advanced disciplines in the area of technical standards.⁴⁸
- NAFTA permits the inclusion of dispute settlement mechanisms in adv/cv matters.⁴⁹

On the basis of these characteristics of NAFTA, we shall now analyze the role it has played in the integration of Latin America.

The current situation of regional integration in the American continent

Efforts to achieve integration in the American continent have had a long and complex history.⁵⁰ By the 1960s, most countries in the region had adopted an import substitution model which implied a restrictive trade policy. However, given that internal markets were small, it was believed that regional markets offered advantages. For this reason, the Montevideo Treaty was established in 1960. This Treaty created the Latin American Free Trade Association (LAFTA) whose aim was to liberalize regional trade over a period of twelve

⁴⁸ Chapter IX applies to all standard-related measures (SRM), including services in land transportation and telecommunications, with the exception of agriculture and procurement standards which are dealt with in their own chapters (VII and X respectively). NAFTA provisions essentially require the use of international standards as the basis for domestic SMR (Article 905.1). Parties shall to the greatest extent practicable, make compatible their respective SMR (Article 906.2). In addition, the Agreement requires mutual recognition when a Party demonstrates the equivalence of its regulation and mutual recognition of conformity assessment procedures when Parties are satisfied as to their adequacy (Article 906.4 and 904.6).

⁴⁹ NAFTA does not include substantive rules on adv/cv matters. Parties are obliged to comply with the GATT provisions, including the Anti-dumping and Subsidies Codes. However Chapter XIX includes the binational panel review of final ad/cvd determinations. This is a unique mechanism and one of the most controversial institutions of the Agreement. For the reasons behind its creation and the problems of its implementation in Mexico see Thomas, J. C. and Sergio López-Ayllón "Nafta's Extension of Specialized Dispute Settlement to Mexico: Challenges in Treaty Interpretation and Reconciling Common Law and Civil Law Systems in a Free Trade Area" in *The Canadian Yearbook of International Law*, vol. XXIII, pp. 75-122.

⁵⁰ For an overview, see Guerra-Borges, Alfredo, *La integración de América Latina y el Caribe*, Mexico, UNAM, 1991.

years. Other regional treaties (such as the Central American Common Market⁵¹, or the Andean Group⁵²) were signed at about the same time. None of these fully complied with its original schedules or objectives.

By the late 1960s, the import substitution model was no longer effective. This, together with the processes of change in the international and regional economy, and the specific political conditions of each country, forced the countries in the region to modify their development strategies, particularly as regards trade and investment policies. In 1980, LAFTA was replaced, through the Montevideo Treaty, by the Latin American Integration Association (LAIA). The aim of this organization is to increase "bilateral trade among the member countries and between member countries and third countries through bilateral and multilateral agreements, with the goal of eventually achieving regional free trade." LAIA has eleven member that include the major Latin American countries and a significant number of trade agreement had been signed under its coverage.

All the countries in the continent are currently members of the WTO, and are signatories to one or several regional integration agreements, the majority of which have been negotiated within the framework of LAIA.⁵³ In ECLA's view, these agreements have had significant consequences for the countries in the region, since international agreements constitute the framework within which national trade policies must be developed.

⁵¹ Established through an instrument signed on December 13 1961 and effective as of June 3 1961.

⁵² Established through the Cartagena Agreement signed on May 26 1969.

⁵³ NAFTA was obviously not negotiated within the framework of LAIA, since neither Canada nor the United States belongs to this organization. Moreover, negotiation of the NAFTA agreement created a problem for Mexico regarding the application of Article 44 of the Montevideo Treaty, which established the obligation of granting the remaining members of this organization Most Favored Nation status. This obligation, which also affected other extra-regional integration agreements (such as the Mercosur-European Union agreements), was resolved through the Interpretative Protocol of Article 44 of the Montevideo Treaty of 1980, allowing members that have granted preferences to third countries the right not to have to apply the MFN clause and to extend these preferences to other LAIA members provided negotiations are launched to compensate LAIA members. Mexico invoked this Protocol with regard to its obligations to LAIA members in respect of its membership in NAFTA.

“Countries should adapt their policies to the new international provisions, and the demands imposed by others in order to mitigate the direct or indirect effects that measures adopted at the national level may have on trade and investment flows. It should be noted that this does not simply involve a change of instruments ... adapting internal legislation entails significant institutional changes and demands the improvement of the State’s institutions to enable it to play its regulatory role efficiently.”⁵⁴

The current status of integration in the region is a highly complex web of agreements whose convergence is uncertain and whose consistency experiences significant problems, which are not always acknowledged.⁵⁵ The following table provides a summary of the most important processes of regional integration in the American continent.

Table 1. Principal multilateral integration agreements in the American continent⁵⁶

AGREEMENT	COUNTRIES	TYPE	OBSERVATIONS
Latin American Integration Association	Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay y Venezuela	Sectoral Agreements (Regional Scope and Partial Scope Agreements)	Replaced LAFTA. Signed August 12, 1980. By 1996, approximately 82 regional agreements had been signed within the framework of LAIA. Nine of these belong to the so-called “third generation agreements” which have broader coverage, including services

(Table continues on the following page)

⁵⁴ Economic Commission for Latin America and the Caribbean, op. cit. supra note 28, p.53.

⁵⁵ For an overview, see LAIA, La situación del proceso de integración en 1996, Montevideo, Latin American Integration Association, 1997 (ALADI/SEC/Estudio 101).

⁵⁶For a detailed analysis of these agreements, see Organization of American States, Trade and Integration Arrangements in the Americas: An Analytical Compendium, Cartagena Colombia, March 21, 1996.

AGREEMENT	COUNTRIES	TYPE	OBSERVATIONS
Southern Common Market (Mercosur)	Brazil, Argentina, Paraguay and Uruguay (Chile)	Customs union	Signed March 26, 1991, effective as of January 1, 1994. Currently constitutes an imperfect customs union. Affiliated to LAIA.
Andean Group	Bolivia, Colombia, Peru, Ecuador and Venezuela	Customs union	Signed May 6, 1969 and modified through the May 25, 1988 Quito Protocol. The 1991 Barahona Act established an Andean Free Trade Area, effective as of January 1, 1992, with common external tariffs.
Central American Common Market	Salvador, Guatemala, Honduras, Nicaragua and Costa Rica	Customs union	Members have declared their aim of creating a common market, but have failed to reach agreement on schedules.
Caribbean Common Market (Caricom)	The original members were Barbados, Guyana, Jamaica, Trinidad and Tobago.	Customs union	Signed July 4, 1973, effective as of August 1, 1973
North American Free Trade Agreement (NAFTA)	Canada, United States and Mexico	Free trade area	Signed December 17, 1992, effective as of January 1, 1994. The free trade area will be established for most goods in 2004.
Group of Three (G3)	Mexico, Venezuela and Colombia	Free trade area	Signed June 13, 1994, effective as of January 1, 1995. Affiliated to LAIA.

Source: Organization of American States Foreign Trade Information System

In addition to these agreements, there have been another fifteen bilateral integration agreements or agreements between an integration group and a country, not to mention the instruments which are currently being negotiated. Finally, to provide a complete overview,

one should also include the thirty-five bilateral investment agreements⁵⁷, which will be crucial to the development of regional integration in the coming years.

What is the role of NAFTA in this process?

First, following the passage of NAFTA, Mexico launched a vast trade negotiations offensive in Latin America.⁵⁸ Six trade agreements have been signed to date, with others are being negotiated. The following chart summarizes the status of Mexico's trade negotiations in the region.

Table 2. Mexico's Trade Agreements in the American Continent

AGREEMENT	STATUS	Under OMC	Under LAIA	NAFTA MODEL
North American Free Trade Agreement	Signed 17/XII/92. In force as of 1/I/94	Y		
Treaty of Montevideo (LAIA)	Signed 12/VIII/80. In force as of 18/III/81	Y		
Free Trade Agreement with G3 (Venezuela and Colombia)	Signed 13/VI/94. In force as of 1/I/95	Y	Y	Y
Free Trade Agreement with Bolivia	Signed 10/IX/94. In force as of 1/I/95	Y	Y	Y
Free Trade Agreement with Costa Rica	Signed 5/IV/94. In force as of 1/I/95	Y	N	Y
Free Trade Agreement with Nicaragua	Signed 18/XII/97. In force as of 1/VII/98	Y	N	Y
Free Trade Agreement with Chile	Signed 17/IV/98. In force as of 1999.	Y	Y	Y
Free Trade Agreement with Guatemala/Honduras/Salvador	Signed 10/V/00 In force 30 days after completion of formalities	Y	N	P
Y = Yes N = No P= Possible U= Unlikely				

⁵⁷ Thirty-two of these agreements were signed after 1990. One should also include the trade agreements which include disciplines and rules applicable to investment. For an overview, see Organization of American States, *Investment Agreements in the Western Hemisphere: A Compendium*, in SICE (Foreign Trade Information System) (compact disc, also available at SICE Web Page <http://www.sice.oas.org>).

⁵⁸ See Blanco Mendoza, Herminio, *Las negociaciones comerciales de México con el mundo*, col. Una visión de la modernización de México, México, Fondo de Cultura Económica, 1994.

As the chart shows, three of the free trade agreements have been negotiated under the coverage of LAIA and are simultaneously agreements of partial scope and free trade agreements. For LAIA, these agreements constitute "third generation agreements".⁵⁹

All the agreements negotiated by Mexico to date have, with few variations, closely followed the NAFTA model. Indeed, in addition to virtually total coverage as regards goods, they all contain rules on services, investments, technical standards, state purchases, intellectual property and dispute settlement. The principal differences lie in the exclusion of some sectors, certain less strict disciplines, and the non-extension of Chapter XIX to these agreements. Although some differences, they are never enough to alter the original NAFTA model significantly. In other words, Mexico has successfully used the NAFTA as a model in its trade negotiations, and, with the exception of Mercosur,⁶⁰ will undoubtedly continue using it in the rest of its agreements currently under negotiation.

In this process, it is also important to point out the fact that Chile had also signed a significant number of trade agreements under the scope of LAIA. However, Chile has recently signed a free trade agreement with Canada which essentially takes up the NAFTA model. Moreover, it recently signed a new free trade agreement with Mexico, replacing the one signed in 1992,⁶¹ whose structure and coverage follow the NAFTA model. In other words, Chile has already signed agreements equivalent to NAFTA with Mexico and Canada. It will be interesting to see the impact that they have on the future of Chile's negotiations.

Thus, NAFTA has played a significant role in regional integration. In the opinion of a well-informed OAS expert:

"The NAFTA has also had a major influence in the practice of trade policy within the region, especially at the technical level where we can see the NAFTA approach being duplicated at the sub-regional level. What are called "newer" Latin American integration efforts have generally adopted more of a "NAFTA-like" approach

⁵⁹ ALADI, *Situación y perspectivas de la liberalización comercial en el marco de la ALADI*, Montevideo, Asociación Latinoamericana de Integración, 1997 (ALADI/SEC/Estudio 99), pp. 8 y ss.

⁶⁰ In this case, during its current phase, a broad coverage agreement is expected to be signed, which will stop short of the establishment of a free trade area. *Ibidem*, p. 15

⁶¹ This was in fact only a partial scope agreement restricted to trade in goods.

than the approach offered by the older Association for Latin America Development and Integration (LAIA)”⁶²

The structure of this scheme proves that the degree of liberalization pursued in NAFTA is a viable model, consistent with multi-lateral rules, yet more advanced, and one which permits effective, efficient continental integration.

This outlook must be analyzed in light of the Free Trade Area of the Americas (FTAA) negotiations.

NAFTA in light of the FTAA

In December 1994, at the behest of the United States, the heads of State of thirty-four countries in the continent agreed in Miami to engage in negotiations to establish a Free Trade Area of the Americas (FTAA) in 2005.⁶³ This aim was recently confirmed in the Santiago Declaration of the Second Summit of the Americas⁶⁴ where Heads of State and Government reaffirmed their “determination to conclude the negotiation of the FTAA no later than 2005, and to make concrete progress by the end of the century”. According to the same Declaration, the FTAA agreement will be “balanced, comprehensive, WTO-consistent and constitute a single undertaking.”

In the San José Declaration⁶⁵ (that served as the basis for the launching of the FTAA negotiations), the trade ministers agreed that the negotiations will encompass all of the areas which fall within the WTO scope, although they also agreed that the negotiations will also cover areas not presently covered under the WTO such as investments, government procurement and competition policy. It is important, however, to note that both investment and procurements are already covered under NAFTA. The agreement also contains some provisions on competition policy, but these will require further development.

⁶² Mackay, Donald R, “The North American Free Trade Agreement: Its Possible Extension to South American Countries” in *Regionalism and Multilateralism after the Uruguay Round. Convergences, Divergences and Interaction*, ed. Paul Demaret, Jean François Bellis and Gonzalo García Jiménez, Brussels, European Inter-university Press, 1997, p. 236.

⁶³ For more information on the development of the negotiation process, see the FTAA official Web Site: <http://www.ftaa-alca.org>.

⁶⁴ Santiago de Chile, April 19, 1998.

⁶⁵ San José, Costa Rica, March 1988.

The negotiation will be carried forward under a structure lasting until 2004. The Trade Negotiations Committee, composed of the Vice Ministers of Trade, will be responsible for its oversight. The Ministers also established the following nine negotiation groups: market access, investment, services, government procurements, dispute settlement, agriculture, intellectual property, subsidies, anti-dumping and countervailing duties and competition policy. A Consultative Group on Smaller Economies was also created.

What will NAFTA's role be during the process, then? In other words, will NAFTA be able to serve as an agreement around which the negotiation process can be structured at the continental level? The answer to this question is, in principle, no. This does not mean, however, that NAFTA will not have an impact on the future of negotiations. I shall put forward some ideas on the subject below.

Some analysts have tried to suggest that the NAFTA model contrasts with the Mercosur approach. I believe that there is no conflict between them, since the two models are not comparable. Indeed, the aim of Mercosur is to establish a customs union, which is why this agreement implies the establishment of mechanisms and institutions appropriate to this form of integration. The NAFTA is restricted to the creation of a free trade area. What we have, then are two agreements with different objectives and structures.

In fact, the problem is framed on the basis of the minimum common denominators that the continental agreement should contain. It is here that the trade interests of the actors come into play to favor strategic positions for certain products and services, and even for the application of fairly rigorous disciplines in markets with sharp differences between them. A brief analysis shows that, under any hypothesis, the minimums of continental agreement could not be less than those contained in the WTO. There has also been a consensus that the FTAA should be a continental agreement which should coexist with subregional and bilateral agreements.⁶⁶

From this perspective, even if the NAFTA model is not implemented, the agreement does, however, contain significant improvements which could be used in the continental approach. Foremost among these is the relationship between investment and services, which is undoubtedly a more liberal and efficient approach than

⁶⁶ See LAIA, *Situación y perspectivas de la liberación comercial en el marco de la ALADI*, Montevideo, Latin American Integration Association, 1997 (ALADI/SEC/Estudio 99).

that which exists in the multilateral model. Other aspects in which the NAFTA can be used as a model is in the issue of government procurements and technical standards.

As regards rules of origin, an enormously complex yet crucial aspect, and as long as there is no consensus as regards multilateral negotiations, NAFTA offers a flexible scheme whose extension, with the appropriate modifications, could serve as the basis for the determination and application of regional preferences.

Finally, one should consider the issues related to dispute settlement. It is generally accepted that the WTO's dispute settlement mechanism has proved effective. For this reason, and to ensure compatibility between multilateral and regional rules, it would be worth considering that the multilateral forum would be an appropriate forum for settling disputes in areas covered by WTO agreements. However, for those aspects not covered by the WTO; the NAFTA model could serve as a model for the creation of a flexible yet effective dispute settlement mechanism. Chapter XIX binational process review does not seem likely to be extended to a Continental Agreement. Instead substantive disciplines regarding ad/cvd and competition policies may be developed in the FTAA.

In short, the complexity of the regional integration process, particularly in light of negotiations concerning the Free Trade Area of the Americas and regional integration agreements, make it unlikely that NAFTA will become the hub of the American system currently being created. This is due as much to the peculiarities of NAFTA itself as to the technical difficulties involved in a process of FTAA's scope.

Nevertheless, I think that NAFTA will be an inevitable point of reference for at least the following three reasons. First, because NAFTA is a significantly more sophisticated and complete model than the majority of existing agreements in the region as regards both coverage and disciplines. Second, because this model has already been accepted in negotiations within the region and, with modifications, has become an element that integrates the system of regional accords. Third, because the negotiators who form part of the North American region will have the NAFTA model in mind as a parameter. These negotiators will obviously play a specific, crucial role in the process.

The processes of regional integration and the agreements that shape them entail immense technical and political difficulties. Spe-

cific interests highlight the difficulties of harmonizing regional and multilateral systems,. There is an obvious risk that the multiplication of regional agreements may create a tangled spider's web, one of whose worst consequences would be to create uncertainty in trade. It will therefore be necessary to work using imagination and flexibility, seeking the most generous rules that are at the same time compatible with the multilateral system. Moreover, particular care will have to be taken with institutional aspects to create a simple, effective and flexible framework, capable of responding rapidly to trade needs. This is the challenge. NAFTA is not a perfect solution, but it does provide certain useful elements. Evaluating its operation and reflecting on it may prove advantageous in the difficult task awaiting us in the coming years.

The Case of Comesa under WTO Rules

OLIVER S. SAASA

*Professor of International Economic Relations
Director Institute of Economic and Social Research
University of Zambia*

Introduction

THE World Trade Organisation (WTO), established in 1995, provides the political and legal framework for the multilateral trading system. Many developing countries in East and Southern Africa have readily adopted economic liberalism as the broad framework for their development policies and have continued to seek to be active in the WTO. The WTO projects itself as a rules-based system that facilitates free and fair international trade in the best interests of all members, now numbering 135. The WTO is, therefore, expected to be a public good that the community of trading nations ought to preserve and develop in the interest of multilateralism, free trade and economic advancement.

The formation of regional trade agreements (RTAs) such as the Common Market for Eastern and Southern Africa (COMESA) in increasing momentum world-wide. By the beginning of 1999, there were at least 162 RTAs globally, exceeding the number of WTO members, then standing at 134. Among the reasons why RTAs are so attractive is that they offer a forum for co-ordinating positions in the WTO. The European Community acts as one in the WTO, and the ASEAN Free Trade Area members as well as those of MERCOSUR have, to a con-

siderable extent, projected common positions on matters of mutual interest. They conduct consultations on issues on the WTO agenda.

COMESA has, likewise, sought to help the member states in raising and projecting a common platform on matters affecting them and has applied for observer status at the WTO. Indeed, COMESA had sent representatives to meetings such as the last WTO Ministerial Conference held in Seattle.

It is equally noteworthy that the treaty for establishing the African Economic Community (AEC), ratified by African governments, envisaged employing existing regional economic communities as its 'building blocks' towards a continental union. The WTO system does encourage regional economic integration schemes in the belief that, in the long run, the goal of achieving global free trade would be attained through them. In fact, increasingly, the perceived importance of regional trade pacts rivals that of the WTO system of trade regulation. This is essentially the paradox: the compatibility of the multilateral trading system and RTAs has emerged as a debatable subject and is currently an issue the WTO Committee on RTAs is mandated to study.

Notwithstanding their acceptability to WTO, RTAs have been a constant concern for the multilateral trading system principally because their proliferation, if not well managed, do threaten to replace or undermine multilateralism that is emerging, (particularly with the popularisation of globalisation) as the better way of managing international economic relations. Indeed, there is a growing concern that the rules governing RTAs as enshrined in the WTO Agreement and in GATT prior to 1995, are systematically being flouted by members of the over 150 RTAs world-wide.

The above concern is not unfounded. RTAs do threaten multilateralism if they are closed and when they adopt programmes that disregard the broad framework and rules of the WTO, including the dispute settlement mechanisms. For example, RTAs could threaten free trade if they become protectionist by, for example, raising barriers to the trade of third countries through unbridled CETs.

The WTO rules, therefore, aim to keep RTAs within the framework of the multilateral trading system and to have RTAs that are open and that do not aim to raise barriers to the trade of third countries. In this regard, RTAs are to be notified to the WTO and are expected to be examined by the WTO Committee on RTAs for com-

pliance with the world body's rules and obligations that are specific to members that form RTAs. Unfortunately, however, the rules have proved to be remarkably unclear to many developing countries (both in terms of content and interpretation) and have, at best, been disregarded altogether by most African members, a phenomenon that has threatened the capacity of RTAs in developing countries of Africa to comply with the WTO framework. In this regard, the interpretation of the WTO rules, as well as the need for RTAs to comply with these rules, has been placed high on the WTO list of priorities.¹

Against the above background, this paper attempts to examine COMESA in the context of the WTO rules. The next section briefly provides the background to COMESA and its current efforts to liberalise trade among the member countries. This is followed by an examination of the degree to which COMESA complies with WTO rules in the context of the former's effort to liberalise intra-regional trade through the creation of a Free Trade Area (FTA). Lastly, the paper looks at the major challenges and opportunities facing the Eastern and Southern African region in the context of regional integration, in general, and implications for the emerging multilateralism, in particular.

The COMESA Regime

COMESA was established in November 1993 in Kampala, Uganda and its treaty came into effect in December 1994. COMESA replaced the regional community previously known as the Preferential Trade Area for Eastern and Southern Africa (PTA). The PTA was established in September 1981 and its treaty came into force in September 1982. All previous PTA members, except Comoros and Somalia, have signed the COMESA treaty. These are Angola, Burundi, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. The COMESA region has a combined population of around 350 million people and a GDP of US\$

¹ See, for instance, the Documents of the Third Ministerial Conference held in Seattle and the annual reports of the Committee to the General Council.

200 billion. The total surface area is over 9 million square kilometres. The region is a source of important minerals such as gold, diamonds among others and contains significant deposits of oil (see map below).

COMESA has the objective of promoting co-operation and development in all fields of trade, customs, industry, transport, communication, agriculture, natural resources and monetary affairs which are believed to raise the living standard of the region's population.

COMESA is currently using or intending to use various liberalisation and integration schemes to facilitate both intra-regional trade and economic integration effort in the region. It has defined its priorities within its mandate within the next five years or so as being the promotion of regional integration through trade and investment. Trade liberalisation is, thus, the main focal point. So far, the Organisation has used various trade liberalisation schemes to facilitate both intra-regional trade and economic integration effort in the region. The key trade liberalisation scheme is tariff reduction. The tariff reduction schedule, which is currently operational, proposes the following reductions on COMESA-originated goods: 60 percent by October 1993; 70 percent by October 1994; 80 percent by October 1996; 90 percent by October 1998; and 100 percent by October 2000.

Map of COMESA Region



The COMESA Secretariat reported in September 2000 that eleven member states have undertaken to implement the COMESA Free Trade Area on 31st October, 2000.² Ministries of Finance of Kenya, Malawi and Zambia are already in the process of presenting their national budgets in which they would announce implementation of zero tariffs for COMESA-originating products. COMESA has scheduled 31st October, 2000 for the effecting of zero tariff. A big event for this is scheduled for Lusaka on that date.

The COMESA Free Trade Area (FTA) formed by eventual elimination of tariffs envisages the establishment of a Common External Tariff (CET). According to this scheme, the CET will be 0 percent on capital goods, 5 percent on raw materials, 15 percent on intermediate goods and 30 percent on final goods. The CET (that entails a customs union) is planned to be in place by the year 2004. Significant work has already been undertaken, or is in the process of being implemented, on the design and implementation of a CET, all with financial and technical support from the European Union. Notable among these are the following:

- The formulation and adoption of a single COMESA Customs Document, the COMESA-CD.
- The establishment of common statistical rules.
- The compilation of a Common Tariff Nomenclature.
- Technical support in the implementation of the Automated System of Customs Data Management (ASYCUDA)³ and EuroTrace.

² These are Djibouti, Egypt, Eritrea, Kenya, Madagascar, Malawi, Mauritius, Sudan, Uganda, Zambia and Zimbabwe. Madagascar has also published necessary legal instruments for effecting zero tariffs on COMESA originating products.

³ Designed as it is to make the customs process more efficient, promotes trade through reducing the time taken to clear goods (thus saving importers and exporters money), so reducing non-tariff barriers to trade. The ASYCUDA programme also has a strong positive effect on revenue generation by making the tariff collection procedure more efficient. This, in turn, allows national governments to streamline tariffs and reduce tariff rates without having an adverse effect on revenue collected.

- An examination of the legal and administrative framework necessary for the introduction and implementation of a CET.
- An examination on the revenue implications of implementing a CET.

In line with COMESA programmes, steady progress has been made in the elimination of non-tariff barriers (NTBs) such as in liberalisation of import licensing, removal of foreign exchange restrictions and taxes on foreign exchange, removal of import and export quotas, removal of road blocks, easing of customs formalities, extending times border posts are open, etc. There are, however, still a number of improvements required to make intra-regional trade easier such as improving the transport and communications structures; ease visa requirements; improve information and access to information on trade opportunities; further reduce customs and bureaucratic procedures at border crossings; etc.

In the area of trade facilitation, the COMESA Secretariat is implementing programme to improve the transport and communications systems of the region as well as improving information available to businessmen wishing to trade both within the region and overseas. The measures taken (or in the process of implementation) currently include the following:

- Harmonised Road Transit Charges.
- COMESA Carrier's License that allows commercial goods vehicles to be licensed, with one license, which is valid throughout the region.
- COMESA Overload Controls.
- Maximum Vehicle Dimensions.
- COMESA Yellow Card Scheme that is a vehicle insurance scheme which covers third-party liability and medical expenses throughout countries participating in the scheme.
- COMESA Customs Bond Guarantee Scheme.

- Advance Cargo Information System.
- Telecommunications Harmonisation.
- Information Dissemination.

Furthermore, in order to ensure fair competition and transparency among economic operators in the region, COMESA is in the process of formulating a regional competition policy. The policy is to be consistent with internationally accepted practices and principles of competition, especially the principles of WTO. The regional competition policy is intended to harmonise existing national competition policies to avoid contradictions and provide a consistent regional economic environment.

In addition to creating the policy environment for freeing trade, COMESA has created specialised institutions to provide the required financial infrastructure and service support. The Trade and Development Bank for Eastern and Southern Africa (PTA Bank) has continued to provide trade and development finance, requiring mediation with international capital markets. The Re-Insurance Company (ZEP-RE) allows smaller insurance companies to spread risk in a wider COMESA insurance pool. The Clearing House, established to enable intra-COMESA trade to take place at a time when most COMESA countries imposed strict exchange controls, is being re-structured to increase private capital flows by better managing risk and information in the new liberalised market setting.

A major role of COMESA is to take the lead in assisting its member States, through promotion and facilitation of regional integration, to make the adjustments necessary for them to become part of the global economy. As part of this process, COMESA prepared a Monetary Harmonisation Programme for the then PTA in 1990, and this programme has been endorsed in the COMESA Treaty in which member States undertake, among other things, to co-operate in monetary and fiscal matters to establish economic stability within the Common Market. The Monetary Harmonisation Programme, in its present form, is envisaged to be implemented in four phases, from 1991 to 2025, with the final phase to culminate in full monetary union which implies the use of irrevocable fixed exchange rates; a single currency or parallel currencies; full harmonisation of economic, fiscal and monetary policies of member States; full inte-

gration of the financial structures of member States; pooling of foreign resources; and the establishment of a common monetary authority. It is, however, recognised that before monetary harmonisation can be achieved, participating countries need to first achieve financial and economic stability.

A Regional Political Risk Guarantee Facility is currently being worked upon since political risk cover from commercial sources or export credit agencies is not available at all for many COMESA countries, and where cover is available it is usually very costly and offered on unfavourable terms. In particular, available cover is either very thin or non-existent for transactions over the medium term, thereby restricting the import of essential capital goods into COMESA countries. The proposal for a regional political risk guarantee facility, termed the Africa Guarantee Facility (AGF), is designed to offer political risk cover when some other financing organisation is willing to offer commercial risk. The AGF envisages the use of IDA credits and other donor or local participants' funds. The concept of using IDA credits as security for the issue of guarantees by a guarantee agency follows principles adopted in a World Bank-sponsored project currently operating successfully in Bosnia and Herzegovina and soon to be operational in other Eastern European countries.

The AGF, as presently proposed, will be a series of related national funds, managed by a common institution. Obligations of the AGF under issued insurance policies are 100 percent backed by the IDA loan funds held in escrow accounts, and syndicates.

COMESA and WTO Compliance

COMESA has been notified to the WTO and now has to show that it complies with the applicable WTO rules. The question now, therefore, concerns the conformity of COMESA with the rules taking into account the notification done and the broad programmes COMESA is part of *vis-à-vis* its mandate to facilitate the creation of a free trade area and a customs union. It is noteworthy, though, that the WTO regime on RTAs in fact provides a possibility of applying different rules to arrangements among developing countries, such as COMESA. However, examination of such arrangements

has cast considerable doubt on the actual application of these special regimes.⁴

Notwithstanding the above, it is a truism that if the Eastern and Southern African region is to achieve significant economic growth, it must do this through full integration into the world economy within the framework of the World Trade Organisation (WTO). COMESA is yet to effectively disseminate information on WTO and the world trading system, and to develop the requisite capacity in the region to allow regional countries to more actively participate in the global economy. Issues that ought to be addressed include topics such as the nature and scope of the current Uruguay Round Agreements; the advantages and opportunities of these agreements to developing countries and the place of LDCs in the current multilateral trading and investment regime; notification procedures; dispute prevention and settlement mechanism; trade related investment measures (TRIMs); intellectual property rights; trade in services; subsidies and countervailing duties; dumping and anti-dumping measures; duty draw-backs and remissions or rebates; free trade zones and free processing zones; and government procurement.

As a minimum, countries in Eastern and Southern Africa are expected to become members of WTO (if they are not already signatories) and, as such, implement the following WTO rules:

- The Agreement on TRIMs that stops governments from using a minimum level of inputs in manufacturing, and to export at least as much as they import⁵.
- The General Agreement on Trade in Services (GATS) that recognises 'commercial presence' as one of the ways in which services are traded.
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that obliges member states to grant minimum periods of protection to copyrights, patents and trade marks.

⁴ Part IV of GATT and the Enabling Clause, and Waivers.

⁵ COMESA rules of origin have not yet taken into account the TRIMS guidelines.

Although it is recognised that, under WTO, developing countries have more time to comply with these provisions than developed countries, it is important that early COMESA compliance would send the right signals to would-be investors.

Challenges and Prospects

A number of concerns are still outstanding among members of COMESA with respect to their entering into an FTA. The loss of government revenue is often cited. A COMESA Free Trade Area means, among others, that the revenue that governments received in the form of customs duties (import tariffs) for goods that are produced and traded among the COMESA member States will be lost. This is because the COMESA FTA requires that goods are traded free of these duties. The COMESA Secretariat, in collaboration with the IMF, is currently conducting detailed studies to establish the implications of the COMESA FTA on COMESA member country economies, including the question of whether or not it will result in revenue loss, and the measures necessary to address that concern. So far, reports that have been submitted such as that for Zambia indicate that the benefits of the COMESA FTA far outweigh any transitional costs. In any case, there may or may not be any negative impact depending on whether or not:

- Revenue from COMESA customs duties form a large part of government revenue. An examination of the member States' customs revenue collected on COMESA imports shows that the amount of revenue likely to be lost would be very small.
- Governments use other methods of taxation to offset revenue loss from customs duties. If member States levy a domestic sales tax or value added tax on imports, revenues may actually increase as a result of the expected increased volume of imports during the COMESA FTA.
- Firms and businesses take advantage of the larger market. The larger market provided by the COMESA free trade area should lead to increased exports and, therefore, increased company profits and direct tax revenue for governments.

The short- and long-term measures that COMESA and regional member countries are undertaking to address the issue of revenue loss include the following:

- Simplification and harmonisation of direct and indirect taxation in national economies with a view to enhancing efficiency and probity in overall public revenue administration.
- Fiscal Compensation.⁶
- Common External Tariff (CET).
- Reducing Dependency on Import Tariff Revenue by earning additional revenues from emerging tax bases such as income from small and medium companies operating in the informal sector, and to remove exemptions enjoyed by certain individuals and companies.
- Reforming the Fiscal System
- Design tax structures that are equitable, administratively feasible, raises sufficient revenue, and minimises distortions through, inter alia, prudent use of commodity taxes, and a balanced incentive-based taxation policy on personal and corporate income.

Some countries fear that a COMESA FTA in October 2000 also means that tariffs and NTBs will be removed, thus exposing those firms, businesses and industries that were protected by these barriers to intense competition. Those firms that are more efficient (especially those located in the more industrially developed member States) could capture a larger share of the additional income benefits resulting from the Free Trade Area. This, it is maintained, would worsen existing development imbalances.

⁶ Under the Cross Border Initiative (CBI), the co-sponsors of the initiative (World Bank, IMF, European Union and AfDB) have undertaken to compensate member States participating in the CBI for the loss of revenue resulting from implementation of the COMESA Tariff Reduction programme during the transitional period. The COMESA Secretariat is discussing with these sponsors ways of incorporating non-CBI COMESA member States.

It is true that under the COMESA Free Trade Area, investment will tend to go to countries with relatively better infrastructure, lower production, transport and distribution costs, thus potentially widening development imbalances among the member States. This does not, however, necessarily mean that differences in development levels that already exist within and between the member States will get worse. If anything, there is ample evidence from the experience of other successful free trade areas that the net effect will be expansion of industry in all member States. Furthermore, increased inter-firm competition will result in substantial welfare benefits in form of lower prices, better quality goods and wider choice of products for consumers. The aggressive and competitive business behaviour that will evolve is important in preparing the region for global competition.

There are, nevertheless, remedies under the COMESA Treaty. Under Article 49 of the Treaty, a member State may protect strategic, sensitive or infant industries by imposing quantitative restrictions or prohibitions on similar goods originating from other member States. This is also applicable when the injury to such industry is a result of implementation of the COMESA programme. Article 61 of the Treaty provides that in the event of serious disturbances occurring in the economy of a member State following the application of the provisions of the Treaty, the member state concerned could take necessary safeguard measures. In case of injury to domestic industry as a result of dumping by other member states, for example, Article 51 provides that a member state may, for the purposes of offsetting or preventing dumping, levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. With regard to injury to domestic industry as a result of the use of subsidies by other member States, Article 52 provides that a member State may, for the purposes of offsetting the effects of subsidies and subject to regulations of Council, levy countervailing duty.

There are also difficulties, even confusion, arising from implementation of programmes that are similar to those of COMESA due to membership in other similar regional groupings. Many COMESA member states are also members of one or more regional groupings such as the East African Co-operation (EAC), the Southern African Development Community (SADC), Southern African Customs Union (SACU), Intergovernmental Authority on Development (IGAD), and

Indian Ocean Commission (IOC). Some member States are concerned that their dual or even multiple membership in these organisations makes it difficult for them to implement agreed programs, including making membership contributions.

This may be a legitimate concern if not well addressed. The area that has the potential to cause the greatest concern is implementation of the trade regime. Presently, only COMESA has a functional post-independence trade regimes in the Eastern and Southern African region outside SACU. Rather than develop its own separate trade regime, EAC is committed to implementing the COMESA trade regime as fast track of COMESA. The IOC has also indicated that it will achieve a free trade area starting from January 2000. Since this is coming before the COMESA FTA in October 2000, it will not complicate the implementation of the FTA of COMESA.

Perhaps of significant concern is that SADC is developing its own trade protocol based partly on the old PTA arrangement of a common list, and has a programme to achieve a free trade area in 8 years time from January 2000. The SADC Trade Protocol was signed in August 1996. Member states have been negotiating the modalities of implementing the SADC Trade Protocol in order to benefit from the arrangement. Since January 1999, member states have been meeting every month to negotiate and agree the phasing out of non-tariff barriers and reduction of tariffs.

On January 25, 2000, the SADC Trade Protocol came into force as two-thirds of the member States had ratified it. Reduction of tariffs in SADC will be done in three phases under category A, B and C with category C being the most sensitive products. The reduction of tariffs on sensitive products will be done in the twelfth year from 2004. The objectives of the SADC Trade Protocol are:

- To further liberalise intra regional trade in goods and services.
- To ensure efficient production with SADC reflecting the dynamic and comparative advantages of its members.
- To contribute towards the improvement of the climate for domestic cross-border and foreign investment.
- To ensure the economic development, diversification and industrialisation of the region.
- To establish a free trade area in the SADC region.

What is worth observing is that there is no example elsewhere in the world where trade between countries is conducted according to more than one trade regime. It follows, therefore, that countries that are members of both COMESA and SADC should conduct their trade on the basis of one regime. Since WTO procedures require that trade be conducted on the basis of the more advanced trade regime, the COMESA trade regime, at least for now, seems to meet this requirement. Also, since businesses favour one customs union with a common external tariff, and since no country can belong to more than one customs union according to WTO rules, it makes sense for countries that are members of SADC (but not SACU) and EAC to adopt the COMESA common external tariff expected to be achieved in 2004.

An equally noteworthy aspect of regional cooperation in Southern Africa *vis-à-vis* dual membership concerns the emerging relationship between South Africa and the European Union (EU) that will have significant impacts on countries trading with the two parties. South Africa and the EU signed a Trade, Development and Cooperation Agreement (TDCA) in 1999 that will lead to an eventual free trade area (FTA) between both parties covering practically all goods within a period of 10 - 12 years. Historically, the EU has been South Africa's most important trading partner.⁷ South Africa successfully applied to join the Lome Convention, but failed to obtain the trade preferences that are offered to all other ACP countries. Consequently detailed negotiations on a bilateral TDCA between the EU and South Africa started in 1997 in order to deal with all the aspects not covered by the country's membership of the Lome Convention. The TDCA was officially signed on 11 October 1999.⁸

The TDCA provides for cooperation between the EU and South Africa in a wide range of areas such as trade, economic relations, financial and technical assistance, cultural and social aspects. The Agreement also includes provisions for continuing political dialogue and development assistance and cooperation. However, the most prominent component of the TDCA relates to the provisions on the establishment of a Free Trade Area (FTA) between the EU and South

⁷ In 1998, 44 percent of the country's total imports came from the EU. On the export side, 32,3 percent of the country's total exports went to EU.

⁸ After many months and rounds of negotiations, the EU and South Africa reached a deal in January 1999. The content of the TDCA was approved by the EU in March 1999.

Africa, but only after a period of transition. The FTA will cover about 90 percent of the trade between the parties, with the EU fully liberalising 95 percent of its imports from South Africa at the end of a transitional period of 10 years, while South Africa will fully liberalise 86 percent of its imports from the EU after a transitional period of 12 years. However, certain South African sectors which are perceived to be sensitive⁹ will continue to enjoy some tariff protection.

Running alongside this agreement is the SADC Protocol on Trade that was technically launched on 1 September 2000. This Protocol, as earlier shown, will see the gradual implementation over 8 - 10 years of a Free Trade Area amongst the fourteen countries of SADC.¹⁰ South Africa is also a member state of SADC which means that it will be implementing two free trade regimes concurrently, for which there will be overlap and significant implications, especially for the other SADC countries. Nine of the fourteen SADC countries are also members of COMESA which, as demonstrated earlier, is moving into a zero tariff Trade Area on 31 October 2000 and subsequently introducing a Common External Tariff four years later. Kenya, Tanzania¹¹ and Uganda have also signed a Treaty re-establishing the East African Community (EAC) which provides for the establishment of a Customs Union by 30 November 2004.¹²

Apart from the COMESA FTA, there is, therefore, a complex array of overlapping regional trade liberalisation schemes going on in Eastern and Southern Africa, each of which will have a bearing on the others. The EU-SA FTA, in particular, will have a number of impacts on the COMESA member States. These effects will be dependent on a number of variables, some of which are already known whilst others are as yet unknown. Although the implementation programme for the SADC Protocol on Trade is close to finalisation, full details are not yet agreed. Similarly, whilst the new Cotonou Partnership Agreement between ACP and the EU has been signed and lays out the parameters for the future trade relations between

⁹ These include motor vehicles, clothing, textiles, red meat, sugar, winter grains and dairy products. Note that the EU and South African trade liberalisation offers under the TDCA are organised in lists which are linked to a specific phasing-down schedule.

¹⁰ Note that only ten countries have so far ratified this Protocol.

¹¹ Tanzania recently withdrew its membership of COMESA.

¹² However the details of implementation of this customs union are not yet agreed.

ACP countries and the EU, the specific details of what will happen from the year 2008 onwards are as yet unknown. Even the transition period until then is uncertain. Will, for example, another waiver be granted by the WTO for extension of the current Lome' Convention provisions or not? There could also be other developments within the COMESA region affecting trade relations that are still unknown. Probably the most significant of these is the WTO and any future round of negotiations which will again change the current status quo on the multilateral trade environment.

In spite of the above uncertainties, there are a number of potential areas of impact on the COMESA countries arising from the EU-SA FTA that are noteworthy. There will be both negative and positive impacts. They include:

- Trade diversion impact.
- Trade creation impact.
- Trade deflection impact.
- Industry impact - particularly on employment and investment.
- Government revenue impact.

Trade diversion could occur when EU products enter the SACU market at preferential or zero tariff rates, thereby becoming more competitive than existing suppliers from COMESA countries. Trade diversion could also take place in the EU market when the EU imports goods from South Africa at preferential or zero tariff, replacing existing imports from COMESA countries. South African goods will now become cheaper in the EU market.

Trade creation will occur when the South African economy grows as a result of the expansion of business resulting from the FTA. This economic growth in South Africa could lead to an increased demand for goods from COMESA countries, where these countries can supply competitively. In theory, there could also be trade creation in the EU market that could have a positive effect on COMESA exporters, but the impact is likely to be so small as to be not worth measuring.

Trade deflection will occur when goods of EU origin enter the South African market at preferential or zero tariffs and then find their way across the borders through the SADC FTA or SACU arrangements. Whilst the most obvious concern is for those COMESA countries that are members of the SACU (Namibia and Swaziland), the same problem could occur with other countries that are also members of SADC, unless adequate customs controls are in place. Of particular concern are those EU products that receive favourable treatment under the EU Common Agricultural Policy. Although a number of these products are excluded from the TDCA, there are still some subsidised products that could find their way into COMESA countries through South Africa.

Impacts on industry could be both negative and positive. There could be expansion of COMESA industries in those sectors that can competitively supply the South African market. With increased growth in the South African market, the demand for imports would grow. Existing COMESA suppliers to the South African market could find demand increasing. The TDCA allows for cumulation so other ACP countries can supply inputs to South African industry for production and export to the EU. Thus, as South Africa expands its exports to the EU, so COMESA countries could be well-positioned to supply inputs, even when they may not be the most competitive source. South Africa may still need to import from ACP countries in order to meet the rules of origin criteria. Such expansion of opportunities should lead to increased investment and employment. Investment may also be attracted to the COMESA countries in those sectors that could supply South African industry with raw materials and intermediate products for further production and export to the EU. Whether or not this actually happens will depend on a number of other factors including the investment regimes and macro-economic conditions in the COMESA countries.

COMESA government revenues would be affected by the TDCA to the extent of the impacts on domestic industry and the related changes in revenue through customs and excise duties. These could be positive or negative, depending on whether exports increase or decrease, whether growth is affected and, hence, imports change. There could be a further impact derived from a possible increase in imports from South Africa as a result of that country's increased competitiveness emanating from the new trade arrangements. This could lead to an increase in tariff revenue in the non-SADC coun-

tries, whilst there would be a short-term increase in the SADC countries.

The impact on the COMESA countries that are also members of SADC is likely to be greater than on the non-SADC countries. Due to the different phasing of the TDCA and the SADC Protocol on Trade, SADC exporters have a window of opportunity where they still have a significant margin of preference over EU exports to SA. This will however be reduced over time. If one assumes that tariffs in South Africa on all SADC and EU imports are currently equal, and therefore ignores the existing preferential trade agreements between South Africa and Malawi and Zimbabwe, SADC exporters will gain significant price advantages over EU competitors at the beginning of the implementation of the agreements.

SADC exporters, therefore, have to pursue the South African market with increased aggression over the next five years, and use this window of opportunity to build capacity and establish strong supply relations. In the longer term, tariff differentials will diminish, and major structural change may be necessary to achieve sustainable price, technological and quality advantages. This will not only require an improvement in transport and communications infrastructure (which is still poorly developed), but a dramatic increase in private sector investment. Furthermore, this will not occur unless the macroeconomic climate, and all other factors that affect investment decisions, also improve.

Against the above realisation, the policy implications for COMESA governments and the business community as a result of the TDCA are significant. Governments in the region will have to take supply side measures to overcome potential lack of competitiveness and to improve the investment climate in order to attract investment that would then boost employment in the growth sectors, and so provide new opportunities to re-deploy workers from industries that will disappear. Alternative revenue sources may need to be identified to make up for the potential losses. There will be additional policy implications in respect of both regional integration initiatives and the WTO multilateral trade regime. The major challenge now is evidently how best to enhance regional integration schemes without compromising the rules and provisions of the WTO multilateral trade arrangement. For COMESA, the challenge is work towards the harmonisation of its trade liberalisation provisions with those of WTO without sacrificing the potential benefits

of cooperation among like-minded economies of Eastern and Southern Africa whose initiatives could rightly be perceived as a building block towards a continental and - ultimately - global community of trading nations. For WTO, the challenge is to popularise its rules in a developing country environment that is increasingly becoming sceptical of the merits of globalisation that is often perceived as being unrepresentative of the immediate interests of the poor economies many of whom still crying for non-reciprocity in the multilateral trade regime.

GATS and Its Relevance to Developing World

MODERATOR: ROBERT HUNJA, THE WORLD BANK

Developing Countries in the New Round of GATS Negotiations: Towards a Pro-Active Role

AADITYA MATTOO

Senior Economist

Development Research Group, The World Bank

Abstract¹

DEVELOPING countries need to ensure that multilateral rules and commitments on trade in services contribute to economically rational policy-making. This paper shows that their reluctant participation in past negotiations and assumption of defensive positions, have not been conducive to the achievement of this goal. The next round of services negotiations requires a change in negotiating strategies. Rather than resist the liberalization of domestic markets and seek a dilution of multilateral rules, they need to push aggressively for (i) liberalization of domestic services markets, emphasizing competition more than a change of ownership, (ii) development of improved rules for domestic regulations that encourage economic efficiency in remedying market failures and pursuing social goals, and (iii) effective liberalization of foreign services markets by the elimination of both explicit restrictions and implicit regulatory barriers. At the same time, industrial countries need to

¹ This paper is a condensed version of Mattoo (1999), which has a more comprehensive discussion of developing country interests and references to the literature. Thanks go to Carsten Fink, Randeep Rathindran, and Arvind Subramanian for contributions to this paper, to Bernard Hoekman, Marcelo Olarreaga, Arvind Panagariya for insightful comments, and to Malina Savova for valuable research assistance. The views expressed are personal and should not be attributed to the World Bank.

rise to the challenge of eliminating the barriers they maintain to exports from developing countries, so that we may witness not a bitter round of grudging concessions, but a virtuous cycle of mutually beneficial liberalization.

Developing countries need to ensure that multilateral rules and commitments on trade in services contribute to economically rational policy-making at the national and international levels. Their reluctant participation in past negotiations has not been conducive to the achievement of this goal. The next round of services negotiations requires a change in negotiating strategies. Rather than resist the liberalization of domestic markets and seek a dilution of multilateral rules, they need to push aggressively for the liberalization of both domestic and foreign services markets and to promote the development of improved rules. At the same time, developed countries must rise to the challenge of eliminating the barriers they maintain to exports from developing countries, so that we may witness a virtuous cycle of mutually beneficial liberalization.

A number of basic themes emerge from this paper and related research on services trade liberalization. There are substantial gains both from liberalization within developing countries, especially in key infrastructure services like telecommunications, transport and financial services, and from the elimination of barriers to their exports. Successful domestic liberalization requires greater emphasis on introducing competition than changing ownership; regulation to remedy market failure and pursue legitimate social goals with economic efficiency; and credibility of policy reform programs. Effective access to foreign markets requires the elimination of explicit restrictions as well as disciplines on implicit regulatory barriers. A central question in preparing for the next round of services negotiations is how the GATS can help achieve these objectives.

This paper discusses why liberalization of trade in services should lead to improved economic performance; argues that certain policy choices developing countries made in key services sectors, often under negotiating pressure, were not socially desirable; discusses the substantial gains that could arise from the elimination of the barriers to developing country service exports; proposes a possible formula for breaking the stalemate on the movement of individual service providers; and demonstrates how appropriately designed GATS rules on domestic regulations can help both to promote reforms at the national level and meaningful market access at

the international level. Table 1 provides a summary of the issues discussed in this paper, their current status and what seem to be the desirable outcomes.

The Benefits of Liberalizing Trade in Services

RESTRICTIONS on trade in services, as on trade in goods, reduce the level of real GDP which is equivalent to a loss in welfare.² In the case of services, there is an additional twist in that, because many services are inputs into production, and inefficient production of such services acts as a tax on production. Thus, goods trade liberalization in the absence of service liberalization could well result in negative effective protection for goods, highlighting the need for the latter to keep pace with the former.³

Well functioning service industries contribute to growth in different ways. An efficient financial sector allows resources to be deployed where they have the highest returns. King and Levine (1993) demonstrate that efficient financial services contribute to and precede faster economic growth. Improved telecom efficiency generates economy-wide benefits as telecommunications are a vital intermediate input and are crucial to the diffusion of knowledge. Similarly, transport services contribute to the efficient distribution of goods within a country, and greatly influence a country's ability to participate in global trade. Business services such as accounting and legal services are important in reducing transaction costs; education and health services are necessary in building up the stock of human capital, a key ingredient in long run growth performance.

Services and goods liberalization differ in some key respects. In services, attaining efficiency is not just a matter of liberalizing trade barriers, but also of instituting an appropriate domestic regulatory framework. Services liberalization also entails, in most instances, movement of factors of production. A country that liberalizes

² The restriction creates a wedge between domestic and foreign prices, leading to a loss in consumer surplus that is greater than the gain in producer surplus arising from higher domestic production.

³ See for example, Hoekman and Braga (1997), Findlay and Warren (1999), and Hoekman and Djankov (1997).

its services sector is likely to augment its stock of capital through increased foreign direct investment (FDI), and to augment crucially the stock of human capital and technology that is embodied in or associated with such FDI. The impact of this on long run growth is unambiguously positive. Furthermore, there is evidence that FDI is more productive than domestic investment (for example Borenzstein et al 1998), indicating the presence of positive technology spillovers. This is as true for developing country capital importers as for industrial country importers of skilled labor services. The contribution of imported skilled labor to the high-technology sectors in the US is now widely recognized.

Studies examining the link between liberalization of trade in goods and growth are as profuse as those on the services-growth link are sparse. This reflects in part the complexity of services sectors, especially the difficulty in encapsulating the multiplicity of restrictions in easily quantifiable and comprehensible indices. An important research priority is to replicate the trade in goods-growth studies for services, while controlling for other determinants of growth. As a first step in filling this gap, Mattoo, Rathindran, and Subramanian (1999) have constructed openness indices for two services sectors—telecommunications and financial services—and introduced these in standard cross-country growth regressions. Although preliminary, the results suggest that the partial correlations between financial services liberalization and growth found by Claessens and Glaessner (1998) and Francois and Schuknecht (1998) are robust: liberalization contributes meaningfully to explaining cross-country growth performance.

Choosing the Pattern of Liberalization

Entry and Ownership

Restrictions on foreign commercial presence assume particular significance in the case of services where cross-border delivery is not possible, so that consumer prices depend completely on the domestic market structure. Restrictions on new entry and on the participation of foreign capital are the most common, particularly in communications and financial services (Table 2). A basic conclu-

sion from the literature on privatization is that larger welfare gains arise from an increase in competition than from simply a change in ownership from public to private hands. In the GATS context countries have often conceded increased "market access" under pressure from trading partners in the form of increased foreign ownership of existing domestic firms, rather than by allowing new entry. Considerable negotiating energy was also devoted to maintaining existing foreign ownership (Mattoo, 1999). This trend was particularly visible in the financial services negotiations, where the "grandfather provisions" guaranteed ownership and branching rights of incumbent foreign firms while far more limited rights were assured for potential entrants, potentially placing them at a competitive disadvantage.

Foreign investment clearly brings benefits even in situations where it does not lead to enhanced competition (i.e., there are entry restrictions). Foreign equity may relax a capital constraint, can help ensure that weak domestic firms are bolstered (for example via recapitalizing financial institutions), and can serve as a vehicle for transferring technology and know-how, including improved management. However, if FDI comes simply because the returns to investment are artificially raised by restrictions on competition, the net returns to the host country may be negative, because returns to the investor may exceed the true social productivity of the investment (Hindley and Smith, 1984). To some extent the rent appropriation may be prevented by profit taxation or by holding competitive auctions of licenses or equity, but the static and dynamic inefficiencies from lack of competition will still exist.⁴

Given the existence of rent-generating restrictions on competition, it is possible to rationalize the observed limitations on foreign ownership as seeking to balance the efficiency-enhancing and the rent-appropriation aspects of foreign investment. However, this still leaves the question why we observe such widespread restrictions on entry. While it is possible to construct special models of market failure, regulatory failure, or both where entry barriers enhance welfare,⁵ restrictions generally aim to protect the incumbent suppli-

⁴ And neither taxation nor auctions addresses appropriation by existing foreign share owners. In this context, grandfathering commitments assume particular significance.

⁵ One example is excessive entry by firms that are ignorant of each others costs; the social benefits of competition between firms may then outweigh the social costs of duplication of investment.

ers (not necessarily national) from immediate competition for infant industry type reasons, to facilitate “orderly exit” or simply because of political economy pressures. Monopolistic or oligopolistic rents may also be seen as a means to allow firms to fulfill universal service obligations. Both of these arguments are considered further below. In some cases a form of “investment pessimism” exists, leading to the belief that promises of oligopoly rents are necessary to attract new investment. However, it is not clear why the market structure needs to be determined by policy, unless there are some initial investments, which benefits may be appropriated by rivals. Finally, governments may seek to raise revenue (or rents for politicians or bureaucrats) by auctioning monopoly or oligopoly rights. This amounts to indirect appropriation of consumers’ surplus. But the static and dynamic inefficiencies consequent upon lack of competition would still exist.

Entry restrictions are becoming harder to justify in the face of growing evidence of the benefits of competition. In Latin America, for example, countries that granted monopoly privileges of six to ten years to the privatized state enterprises saw connections grow at 1.5 times the rate achieved under state monopolies but only half the rate in Chile, where the government retained the right to issue competing licenses at any time (Wellenius, 1997). Mattoo (1999) finds a significant negative relationship between performance (measured by price and quality indicators) and the number of firms and the existence of an independent regulator, and generally a weaker relationship with the share of public and foreign ownership. These results support the view that the consumer benefits arise more from increased competition and effective regulation than from a change in ownership.

Precommitment to Future Liberalization

One reason governments may be reluctant to liberalize immediately is a perceived need to protect the incumbent suppliers from competition—either because of infant industry type arguments or to facilitate “orderly exit.” One reason for the failure of infant industry policies in the past, and the innumerable examples of perpetual infancy, was the inability of a government to commit itself in a credible way to liberalize the industry at some future date. The GATS offers a valuable mechanism to overcome the credibility dif-

ficulty. Governments can make binding commitments to provide market access and national treatment at a future date. Failure to honor these commitments would create an obligation to compensate those who are deprived of benefits, making the commitment more credible than a mere announcement of liberalizing intent in the national context. A precommitment to liberalize can also instill a sense of urgency in domestic reform and in efforts to develop the necessary regulatory and supervision mechanisms.

Several governments have taken advantage of the GATS to strike a balance between their reluctance to unleash competition immediately on protected national suppliers and their desire not to be held hostage in perpetuity either to the weakness of domestic industry or to pressure from vested interests. The most striking examples are in basic telecommunications, where a number of developing countries have bound themselves to introduce competition at precise future dates. However, the use of the GATS as a mechanism for lending credibility to liberalization programs has been disappointing in other sectors.

Furthering Services Exports of Developing Countries

THERE are likely to be significant gains world-wide if restrictions on services exports from developing countries are eliminated. With greater liberalization, particularly in mode 4 — movement of natural persons — many more developing countries could “export” at least the significant labor component of services such as construction, distribution, environmental and transport.

Potential Gains and Current Barriers

One of the most striking recent examples of a developing country service export success story is the Indian software industry, which has emerged as a significant supplier to industrial country markets. Indian software exports grew from US\$ 225 million in 1992-93 to US\$ 1.75 billion in 1997-98 (at a compound annual growth rate of approximately 50 percent).⁶ Some elements of this story are note worthy.

⁶ See the National Association of Software and Service Companies (NASSCOM) website <http://www.nasscom.org>. These exports consist mainly of standardized coding and testing services.

Despite the growing importance of cross-border electronic delivery of software services, the movement of natural persons remains a crucial mode of delivery. Even though the share of on-shore services in total Indian software exports has been in continuous decline (in 1988, the percentage of on-site development was almost as high as 90 percent), about 60 percent of Indian exports are still supplied through the temporary movement of programmers, i.e. services are delivered on-shore, at the client's site overseas.⁷

It cannot be assumed that other countries' trade policies will become progressively more liberal, particularly with regard to movement of persons. In the early 1990s, the U.S. government introduced rules that obliged foreign workers to acquire temporary work visas (H1-B visas), and limited the number of visas issued during a year to 65,000. This contributed to the relative decline of on-shore services by Indian firms (Heeks, 1998). In 1998, in response to mounting labor shortages experienced in the U.S. IT sector, the annual visa cap was raised to 115,000 for both 1999 and 2000. This quota increase is likely to lead to a boost in U.S. on-site imports of software services, especially as they relate to "Year 2000" work. The question is whether liberalization will continue after the "Year 2000" problem has been resolved.

Significant gains can be had from further liberalization. There are wide differences in the cost of software development and support: the average cost per line of code in Switzerland (the most expensive country) exceeds by more than five times that of India (the cheapest country); average salaries are more than eleven times higher in Switzerland (Mattoo, 1999). Even though differences in labor productivity imply that a lower average salary of programmers may not necessarily translate into a lower average cost per line of software code, by outsourcing programming activities firms in industrial countries can significantly save on development and support costs. Against the background of a total market for software services worth about US\$ 58 billion in the United States, US\$ 42 billion in Europe and US\$ 10 billion in Japan, such cost savings could well be substantial.⁸ Other gains from trade liberalization for

⁷ See <http://www.nasscom.org>. The dominance of on-shore delivery is due to among others a reduction in information asymmetries with regard to the performance of programmers, need for continuous client-developer interaction, and demands by Indian programmers to be sent abroad, in part to improve their skills and expose themselves to international markets (see Heeks, 1998).

⁸ These figures were computed from WTO (1998), Table 3. Data refer to 1997.

importing countries include a more competitive market structure for software services, increased choice, as countries may develop a special expertise for certain development or support services, and greater diffusion of knowledge.

Health services are another area in which developing countries could become major exporters, either by attracting foreign patients to domestic hospitals and doctors, or by temporarily sending their health personnel abroad. In Cuba, the government's strategy is to convert Cuba into a world medical power. SERVIMED, a trading company created by the government, prepares health-tourism packages. During 1995/96 25,000 patients and 1,500 students went to Cuba for treatment and training respectively, and income earned from sales to health services to foreigners was US\$ 25 million. Again, cost savings for patients and health insurers can be significant. For instance, the cost of coronary bypass surgery could be as low as Rs 70,000 to 100, 000 in India, about 5% of the cost in industrial countries. Similarly, the cost of a liver transplant is one-tenth of that in the United States (United Nations and WHO, 1998).

A major barrier to consumption abroad of medical services is the lack of portability of health insurance. For instance, US federal or state government reimbursement of medical expenses is limited to licensed, certified facilities in the United States or in a specific American state. The lack of long-term portability of health coverage for retirees from OECD countries is also one of the major constraints to trade. In the United States for instance, Medicare covers virtually no services delivered abroad. Other nations may extend coverage abroad, but only for limited periods such as two or three months. This constraint is significant because it tends to deter some elderly persons from traveling or retiring abroad. And those who do retire abroad are often forced to return home to obtain affordable medical care. The potential impact of permitting portability could be substantial. If only 3 percent of the 100 million elderly persons living in OECD countries retired to developing countries, they would bring with them possibly US\$ 30 to 50 billion annually in personal consumption and \$10 to 15 billion in medical expenditures (United Nations and WHO, 1998).

Many different barriers constrain the movement of natural persons. The many formalities alone (for example to obtain a visa) make red tape related to FDI seem trivial by comparison. The most obvious barriers are explicit quotas and economic needs tests, for

example requirements that employers take timely and significant steps to recruit and retain sufficient national workers in the specialty occupation, and that no worker has been laid off for a certain period preceding and following the filing of any work permit or visa application.⁹ Qualification and licensing requirements and the regulations of professional bodies are major barriers as well. The entry of foreigners can be impeded by non-recognition of their professional qualifications, burdensome licensing requirements or by the imposition of discriminatory standards on them. The requirement of registration with, or membership of, professional organizations can also constitute an obstacle for a person wishing to provide the service on a temporary basis.

Using the GATS Negotiations to Enhance Market Access

There is no doubt that the Uruguay Round outcome in services was unbalanced. The much-touted trade-off between modes of delivery simply did not take place. Although antipathy to commitments on labor mobility in partner countries was a major contributing factor, an unwillingness on the part of developing countries to open up domestic services markets made their demands for labor mobility difficult to sustain. With developing countries opening up their markets, the prospects for serious inter-modal trade-offs are greater now — for example liberalization of labor movement in return for allowing greater commercial presence for foreign service providers. Severe shortages of skilled labor in the US and the powerful constituency of high-technology companies lobbying for relaxation of visa limits also makes this a propitious time to put labor mobility squarely on the negotiating agenda.¹⁰

It would seem to be in the interest of all countries to separate clearly temporary movement from migration, and to push for liber-

⁹ Other barriers to movement of natural persons include double taxation, wage-matching requirements (wages paid to foreign workers should be the similar to those paid to nationals in that profession, thus eliminating the cost advantage for foreigners), and local training requirements (to replace foreign with national labor within a certain time frame).

¹⁰ The notions of the US as the unrivalled center of technology and the role of technological progress in motorizing the recent US economic expansion resonate deeply with the US public. They would therefore be loath to countenance any obstacles to this march of progress even if it involves greater imports of labor-related services.

alization only with respect to the former. For exporting countries, it is clear that both the financial and knowledge benefits would be greatest if service suppliers (particularly those who have benefited from a subsidized education) return home after a certain period abroad.¹¹ For importing countries, such temporary movement should create fewer social and political problems than immigration.

One option to extract meaningful mode 4 commitments would be to require a country to provide increased “foreign labor content entitlements” to their domestic firms in relation to the country’s increased exports of services.¹² The requirement would be internationally symmetric: all countries would be obliged to create such entitlements, though how much they are used would be determined by sound economic considerations of modal comparative advantage. Entitlements would not be bilateral, but international. This approach is also based on a balance of concessions, an appealing principle in trade negotiations. Exporters of labor services would receive benefits commensurate with efforts to open up their domestic services markets. The scheme would also generate a desirable liberalizing momentum. Conventional mercantilist negotiations on trade barriers create a holdback problem: I would rather give less to get more from you. By linking my export possibilities to your actual exports, the proposed scheme induces me to be more open.

Ensuring Barrier-free Electronic Commerce

Electronic commerce offers an increasingly viable alternative to the movement of individuals. WTO Members have decided that for the moment electronic delivery of products will continue to be free from customs duties. There are proposals to make this decision permanent. Fortunately most electronic commerce is already free of barriers (except of course those created by differences in standards),

¹¹ Over 50% of all migrating physicians come from developing countries. In Ethiopia, for example, during 1984-94, 55.6 percent of the pathology graduates from the Addis Ababa Faculty of Medicine left the country. In Ghana, of the 65 who graduated from the Medical School in 1985, only 22 remained in the country by 1997. If these countries had adequate medical staff at home, these figures would be less cause for concern.

¹² Mattoo and Olarreaga (2000). In a way Bill Gates’ recent testimony before congress arguing for the need to allow more software engineers to enter to maintain international competitiveness is not far-removed from the suggested scheme.

and so the objective is really to preclude the introduction of new barriers. But is duty-free electronic commerce the appropriate route?

Liberating e-commerce from duties is either superfluous or virtually devoid of value. Since the bulk of such commerce concerns services, the relevant regime is that established by the GATS regime on cross-border trade. The GATS allows countries to decide whether to commit to market access, thus not to impose quotas, and to national treatment, thus not to discriminate in any way against foreign services and suppliers. If a country has already made such a commitment, then any further promise not to impose duties is superfluous because customs duties inherently discriminate against foreign services. If a country has not made such a commitment, then the promise not to impose customs duties is worth little, because a country remains free to impede access through discriminatory internal taxation – which has been carefully excluded from the scope of the decision. Worse, the prohibition of such duties may induce recourse to quotas which are ironically still permissible in spite of being economically inferior instruments. Hence, the focus on duty-free treatment is misplaced. The objective should rather be to push trading partners into making deeper and wider commitments under the GATS on cross-border trade regarding market access (which would preclude quantitative restrictions) and national treatment (which would preclude all forms of discriminatory taxation).

Table 3 summarizes the current state of commitments on cross-border supply in some of the areas in which developing countries have an export interest. In software implementation and data processing, of the total WTO Membership of over 130 only 56 and 54 Members, respectively, have made commitments; and only around half of these commitments guarantee unrestricted market access, and a similar proportion guarantee unqualified national treatment. In all professional services, there are commitments from 74 Members, but less than a fifth assure unrestricted market access and national treatment, respectively. There clearly remains considerable scope for widening and deepening commitments.

Dealing with Domestic Regulations

DEVELOPING countries have much to gain from strengthened multilateral disciplines on domestic regulations. The development of such disciplines can play a significant role in promoting and consolidating domestic regulatory reform. The telecommunications experience is a powerful example of this possibility. Such disciplines can also equip developing country exporters to address regulatory barriers to their exports in foreign markets.¹³ For instance, unless disciplines are developed to deal with licensing and qualification requirements for professionals, market access commitments on mode 4 will have only notional value. However, there are limits to what can be achieved at the multilateral level, and some of the key regulatory challenges must still be addressed at the national level. This is because multilateral trade rules are designed to ensure market access, and not directly to promote economic efficiency or social welfare.

One of the ironies of the GATS is that among its weakest provisions are those dealing with domestic regulations, which have such an obviously powerful influence on international trade in services. The reason is not difficult to see: it is extremely difficult to develop effective multilateral disciplines in this area without seeming to encroach upon national sovereignty and unduly limiting regulatory freedom. Nevertheless, it is desirable and feasible to develop horizontal disciplines for domestic regulations.¹⁴ The diversity of services sectors, and the difficulty in making certain policy-relevant generalizations, has tended to favor a sector-specific approach. However, even though services sectors differ greatly, the underlying economic and social reasons for regulatory intervention do not. And focusing on these reasons provides the basis for the creation of meaningful horizontal disciplines.

Such a generic approach is to be preferred to a purely sectoral approach for at least three reasons: it economizes on negotiating effort, leads to the creation of disciplines for all services sectors

¹³ These gains, of course, imply a cost: giving up domestic regulatory discretion. But if multilateral disciplines are desirable then this cost is no different from the first benefit identified above.

¹⁴ What follows draws upon Gamberale and Mattoo (1999).

rather than only the politically important ones, and reduces the likelihood of negotiations being captured by sectoral interest groups. It is now widely recognized that the most dramatic progress in the EU single-market program came from willingness to take certain broad cross-sectoral initiatives. In the WTO context, the experience of the accountancy negotiations shows the propensity for single sectoral negotiations on domestic regulations to produce a weak outcome.

Even if a horizontal approach is desirable, is it feasible? The economic case for regulation in all services sectors arises essentially from market failure attributable primarily to three kinds of problems: natural monopoly or oligopoly, asymmetric information, and externalities. Market failure due to natural monopoly or oligopoly may create trade problems because incumbents can impede access to markets in the absence of appropriate regulation. Because of its direct impact on trade, this is the only form of market failure that needs to be addressed directly by multilateral disciplines. The relevant GATS provision, Article VIII dealing with monopolies, is limited in scope. As a consequence, in the context of the telecom negotiations, the reference paper with its competition principles was developed in order to ensure that monopolistic suppliers would not undermine market access commitments (Tuthill, 1997). These principles should be generalized to a variety of other network services, including transport (terminals and infrastructure), environmental services (sewage), and energy services (distribution networks), by ensuring that any major supplier of essential facilities provides access to all suppliers, national and foreign, at cost-based rates. At the same time, there is a need to strengthen Article IX to deal with international cartels, for example in transport services, which cannot be adequately addressed through national competition policy.

In all other cases of market failure, multilateral disciplines do not need to address the problem *per se*, but rather to ensure that domestic measures to deal with the problem do not serve unduly to restrict trade. (The same is true for measures designed to achieve social objectives.) Such trade-restrictive effects can arise from a variety of technical standards, prudential regulations, and qualification requirements in professional, financial and numerous other services as well as from the granting of monopoly rights to complement universal service obligations in services like transport and telecommunications. The trade-inhibiting effect of this entire class of regulations is best disciplined by complementing the national treat-

ment obligation with a generalization of the so-called necessity test. This test leaves governments free to deal with economic and social problems provided that any measures taken are not more trade restrictive than necessary to achieve the relevant objective. This test is already part of the recently established disciplines in the accountancy sector. It is desirable to use it to create a presumption in favor of economically efficient choice of policy in remedying market failure and in pursuing non-economic objectives (Mattoo and Subramanian, 1998). For instance, in the case of professionals like doctors, a requirement to re-qualify would be judged unnecessary, since the basic problem, inadequate information about whether they possess the required skills, could be remedied by a less burdensome test of competence. In sum, the telecommunications and accountancy models, suitably developed and generalized, can together ensure that domestic regulations achieve their objectives without sacrificing economic efficiency.

This is not to say that there is no need for sector-specific disciplines. For instance, there is valuable work that could be done to establish how best to deal with asymmetric information and differences in standards between countries. But we can make a useful beginning by taking a cross-sectoral approach. Such a route is particularly desirable because at the multilateral level, harmonization and mutual recognition are not meaningful alternatives to the application of a necessity test – even though they can play a role at the regional or plurilateral level. The pessimism with regard to harmonization is based on the absence of widely accepted international standards in services.¹⁵ With regard to mutual recognition agreements (MRAs), it would seem that even in strongly integrationist Europe, despite a significant level of prior harmonization, the effect of MRAs may have been limited by the unwillingness of host country regulators to concede complete control (Nicolaidis and Trachtman, 1999). In any case, MRAs are like sector-specific preferential arrangements, and can have similar trade-creating trade-diverting effects. Multilateral disciplines must be used to ensure that MRAs are not used as a means of discrimination and exclu-

¹⁵ Where such standards exist, as in banking or maritime transport, meeting them is seen as a first step towards acceptability, rather than as a sufficient condition for market access.

sion.¹⁶ Otherwise, their result may well be to create trade according to patterns of mutual trust rather than the pattern of comparative advantage.

The development of multilateral disciplines is in no way a substitute for strengthening domestic regulatory mechanisms and institutions. At least three areas are of considerable importance.

Dealing with Monopolies

The Telecom Reference Paper (short reference or explanation?) illustrates both the strengths and the limitations of the multilateral approach. The primary concern of the paper, as of WTO rules in general, is to ensure effective market access, and hence the focus on the terms of interconnection. Wider concerns about consumer interests and how they may be affected by monopolistic behavior are not addressed by the Paper. There can be little doubt that price determination is ideally left to competitive markets, and that regulatory price setting is fraught with difficulties. However, regulatory authorities in developing countries, where competition is slow to develop, need to equip themselves, legally and technically, with the ability to regulate prices.¹⁷ This would seem particularly desirable in countries like some of those in the Caribbean, which have locked themselves into exclusive supply contracts with a single telecom provider well into the next century. Importantly, while nothing in the GATS prevents a country from pursuing any form of pro-competitive regulation provided it is not discriminatory, the capacity of most developing countries to exercise such regulation is limited.

¹⁶ These disciplines operate at two levels: the general rules on preferential arrangements and the specific rules for MRAs. Article V on integration agreements does not explicitly preclude MRAs, and several countries have chosen to notify their MRAs under this provision. However, Article VII of the GATS dealing specifically with recognition, strikes a delicate balance by allowing such agreements, provided they are not used as a means of discrimination and third countries have the opportunity to accede or demonstrate equivalence. It should be clarified that this provision, with its desirable non-discriminatory and open-ended nature, overrides Article V of the GATS as far as MRAs are concerned.

¹⁷ In many industrial country markets where fully competitive conditions have not been established, such as the telecommunications sector in the United Kingdom, the final price itself has been regulated.

Dealing with Asymmetric Information

The need for effective regulation of financial services needs no elaboration, particularly in light of the recent experiences of many countries. Again it is incumbent on the countries themselves to create adequate mechanisms for such regulation. And such regulation is clearly necessary to benefit fully from liberalization. Other areas where the inadequacy of regulatory mechanisms to deal with asymmetric information is a problem have received relatively less attention. For instance, in professional services, low standards and disparities in domestic training and examinations can become a major impediment to obtaining foreign recognition. Thus inadequacies in domestic regulation can legitimize external barriers to trade. A further twist is that domestic consumers may actually prefer cheap, low quality products. The question of how best to achieve the needs of export markets given domestic preferences for quality is clearly an area where much more research is needed.

Achieving Universal Service and Non-economic Objectives

Attaining social objective in an economically efficient manner is a major challenge for national policy-makers. The manner in which they pursue this objective can have a profound impact on trade in a variety of areas, ranging from financial, transport, telecommunications, health and education services. Interestingly, the telecom Reference Paper acknowledges the right of a country to define universal service obligations provided they are administered in a transparent, non-discriminatory, and not excessively burdensome manner. But it does not prescribe the appropriate means to achieve this objective – this is left to national governments.

Historically, governments frequently relied on public monopolies to pursue (often unsuccessfully) universal services objectives, either through cross-subsidization across different segments of the market, or through transfers from the government or government-controlled banks. In addition to the inefficiencies created by monopolistic market structures, the burdens imposed by these obligations on existing national suppliers are even now a major impediment to liberalization in many countries. For instance, domestic banks saddled with bad debts because of past directed-lending programs are not well equipped to deal with foreign competition.

Nevertheless, the current handicap of universal service obligations can in principle also be imposed on new entrants. Thus, such obligations were part of the license conditions for new entrants into fixed network telephony and transport in several countries. But as in many other cases, recourse to fiscal instruments has proved more successful than direct regulation. For instance, in Chile, government subsidies equivalent to less than 0.5 percent of total telecommunications revenue, allocated through competitive bidding in 1995, mobilized 20 times as much private investment to extend basic telephone services to rural areas (Wellenius, 1997).

A third instrument is to fund the consumer rather than the provider (Cowhey and Klimenko, 1999). Governments have experimented with various forms of vouchers, from education to energy services. This last instrument has at least three advantages: it can be targeted directly at those who need the service and cannot afford it; it avoids the distortions that arise from artificially low pricing of services to ensure access; and finally, it does not discriminate in any way between providers.

Conclusion

ALTHOUGH the most important services policy reforms need to be taken at the domestic level, there is substantial scope for constructive use of the multilateral trading system both in realizing credible domestic liberalization and securing market access abroad. This paper has discussed some of the major issues confronting developing countries—a more comprehensive treatment can be found in Mattoo (1999). Major recommendations are summarized in Table 1 above.

Certain policy choices made by developing countries, often under negotiating pressure, are not likely to maximize domestic welfare. Examples emphasized in this paper were “market access” concessions that allow increased foreign ownership of existing firms rather than new entry, and that guarantee the privileged status of foreign incumbents. Furthermore, where the immediate introduction of competition was not feasible, too little advantage has been taken of the GATS to lend credibility to future liberalization plans.

Persistent barriers to services exports of developing countries are depriving the world of substantial welfare gains. These barriers include explicit quotas whose elimination or relaxation must be negotiated directly, and implicit regulatory hurdles that must be dealt with by strengthening GATS rules on domestic regulations. In particular, efforts must be made to break the stalemate on the movement of individual service providers. Creating "foreign labor content entitlements" is one possibility. It is also desirable to enhance the security of market access for electronic delivery of services. This is best accomplished by widening and deepening the scope of GATS commitments on cross-border delivery, rather than by perpetuating the current WTO decision on duty-free treatment for electronically delivered products.

One of the ironies of the GATS is that provisions dealing with domestic regulations are among its weakest, even though they have an obviously powerful influence on international trade in services. Appropriately designed GATS rules on domestic regulations (on which negotiations have already begun) can serve a valuable dual purpose, helping both to promote reform at the national level and meaningful market access at the international level.

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Table 1. Summary of Selected GATS Negotiating and Domestic Policy Issues, Current Status and Desirable Outcomes

ISSUE	CURRENT STATUS	DESIRABLE OUTCOME
Market access commitments under Article XVI of GATS	Numerous restrictions, particularly on entry and foreign equity; in some cases more emphasis on allowing increased foreign ownership and protecting foreign incumbents than on allowing new entry.	Further liberalization, with greater emphasis on eliminating restrictions on entry and promoting increased competition.
	Limited use of the GATS, except in basic telecom, to precommit to future liberalization.	Wider use of the GATS to lend credibility to future liberalization programs.
	Extremely limited market opening commitments on the presence of natural persons.	Enhanced scope for the temporary, contract-related presence of natural persons.
Pro-competitive regulation (Articles VIII and IX, and the Telecom Reference Paper)	Weak basic provisions with limited scope (Article VIII) and limited bite (Article IX), but commitment to desirable principles in the Reference Paper should contribute to enhanced competition.	Generalize the pro-competitive principles in the Reference Paper to other network-based sectors.
		Strengthen disciplines (Article IX) to deal with international cartels (for example in transport). Strengthen domestic pro-competitive regulation to protect interests also of consumers.
Domestic regulation (Article VI)	Weak current disciplines (Article VI:5), allow "grandfathering" of protection through certain regulatory instruments; some success in accountancy negotiations in instituting a "necessity test" but disappointing elaboration of disciplines on measures such as qualification requirements.	Generalize the application of a necessity test to regulatory instruments in all sectors, especially where they impede developing country exports. Strengthen domestic regulations to remedy asymmetric information-related problems in financial, professional, and other services. Choose economically efficiency instruments to achieve universal service objectives.

(Table continues on the following page)

Table 1. Summary of Selected GATS Negotiating and Domestic Policy Issues, Current Status and Desirable Outcomes (continued)

ISSUE	CURRENT STATUS	DESIRABLE OUTCOME
Mutual Recognition Agreements (Article VII)	Delicate balance (in Article VII): MRAs are allowed provided recognition is not used as a means of discrimination and third countries have the opportunity to accede or to demonstrate equivalence.	Ensure that MRAs do not become a means of discrimination. Improve quality and uniformity of domestic regulation where socially desirable, to strengthen case for foreign recognition.
Safeguards (Article X)	Limited progress in current negotiations; no agreement on whether such a mechanism is necessary, desirable, or feasible.	Create an avenue for temporary adjustment-related demands for protection, provided it is subject to strong, enforceable disciplines that prevent protectionist abuse.
Government procurement (Article XIII)	Limited progress in current negotiations; general reluctance to assume strong disciplines.	Promote transparency and non-discrimination disciplines, but link to the elimination of barriers to mobility of natural persons to fulfill procurement contracts in construction and other services.
Subsidies (Article XV)	Subject to non-discrimination requirements where national treatment commitments exist. Little progress in current negotiations.	Ensure freedom for the use of subsidies where they are the best instrument to achieve legitimate economic or social objectives.
Electronic commerce	Decision not to impose customs duties, which has little meaning since quotas and discriminatory internal taxation are still permitted in many cases.	Widen and deepen scope of cross-border supply commitments on market access (prohibiting quotas) and national treatment (prohibiting discriminatory taxation) to ensure current openness continues.

Table 2. Types of Market Access Restrictions on Commercial Presence in Service Sectors (All Countries)

SECTOR	Number of Members with Commitments	Number of Suppliers	Value of Transactions or assets	Number of Operations	Number of Natural Persons	Types of Legal Entity	Participation of Foreign Capital
1 Business services	89	0.2	3.4	0.0	0.8	4.0	3.6
2 Communication services	85	3.9	2.1	0.2	0.5	4.3	3.8
3 Construction and related engineering services	60	0.1	0.9	0.0	0.2	0.9	0.9
4 Distribution services	38	0.2	0.7	0.0	0.1	0.4	0.4
5 Educational services	32	0.1	0.3	0.0	0.0	0.9	0.5
6 Environmental services	40	0.2	0.7	0.0	0.1	0.7	0.6
7 Financial services	91	4.6	4.3	1.4	0.9	8.6	4.4
8 Health and related social services	34	0.2	0.3	0.1	0.2	0.6	0.4
9 Tourism and travel related services	114	0.2	0.4	0.1	0.1	0.5	0.4
10 Recreational, cultural and sporting services	49	0.1	0.3	0.0	0.1	0.5	0.2
11 Transport services	70	0.3	0.9	0.0	0.1	1.9	1.4

Source: Adlung, Carzeniga, and Mattoo (1999).

Note: Restrictions per commitment are calculated by dividing the total number of restrictions in a sector by the number of Members with commitments.

Table 3. GATS Commitments on Mode 1 in Selected Service Sectors

SECTOR/SUBSECTOR	Number of Countries	Market Access			National Treatment		
		Cross-Border Supply (%)			Cross-Border Supply (%)		
		Full [*]	Part [*]	No [*]	Full [*]	Part [*]	No [*]
Professional Services	74	19	17	64	14	10	76
Computer and Related Services							
a. Consultancy service related to the installation of computer hardware	51	57	20	24	51	22	27
b. Software implementation	56	54	27	20	48	29	23
c. Data processing	54	54	26	20	46	31	22

*Full: full commitment; Part: partial commitment; No: no commitment.

Note: Percentage may not add up to 100 due to rounding.

Trade in Agriculture

MODERATOR: AMADEU BLASCO MUNOZ, THE WORLD BANK

Policy, Cultural and Scientific Challenges Ahead: Prospects for an Agreement on Agriculture in the Next WTO Negotiation Round

RANDY GREEN

*Senior Government Relations Representative
McLeod, Watkinson & Miller*

NO one should be surprised that the United States has made agricultural policy reform a prominent part of its international agenda. Several factors have made the press for more liberalization an imperative for the United States and many other nations, as the World Trade Organization (WTO) considers a new round of trade talks.

First, there is the language of the Uruguay Round Agreement on Agriculture (URAA) itself, which in Article 20 calls specifically for further negotiations. Along with discussion of trade in services, these talks constitute the “built-in agenda” of the WTO at the millennium’s threshold.

Second, the internal logic of the URAA suggests that its work is not concluded. By creating categories of agricultural policies to be brought under multilateral disciplines, and then mandating relatively modest percentage cuts in several of these policies, the URAA structure begs the question whether what has been cut, say, 21% (in the case of subsidized exports) might be cut another 21%, or even eliminated.

Third, a reasonable observer of agricultural trade since the Round would conclude that its achievement was one of principles rather

than performance. The Round made decisions of enormous precedential value, but trade flows changed little as a result. It is natural that those who thought to gain from liberalization perceive some unfinished business.

Finally, the costs of government intervention remain high. Among the member nations of the Organization for Economic Cooperation and Development (OECD), agricultural policies are estimated to cost a cumulative \$361 billion a year or \$327 for each person in each country. Further liberalization holds out the promise of curtailing these expenditures.

Unlike my colleague from the European Union, I am not an official spokesman for the U.S. position in the current talks. So if you are hoping for an inside scoop on the thinking of influential U.S. trade negotiators, I am afraid you will be disappointed. However, I will try to do three things in my presentation. First, I will summarize the comprehensive U.S. proposal for liberalized agricultural trade. Second, I will describe some of the positions and arguments that are common to most U.S. agricultural and food industry organizations. Third, I will offer some personal commentary on the issues raised by the U.S. paper and other papers tabled so far.

The Uruguay Round Trinity

THE URAA applies disciplines to policies in three areas, and this trinity of policy measures will probably be useful in thinking about what might be accomplished in the next few years as well. It is not that there are no other issues; of course, there are many. I believe, however, that the United States and its allies will find it in their interest to insist on the URAA trinity as an organizing principle.

The three relevant policy groups are those affecting market access, export competition, and domestic support. The logic of the Uruguay Round was that public policies affect trade, including the trading interests of other nations, if they (1) stop or hinder goods at the border (market access); (2) displace sales by competitors in third markets (export competition); or (3) generate exportable surpluses that depress world prices (domestic support).

These are hardly radical ideas when it comes to manufactured goods, having informed the operation of the General Agreement on

Tariffs and Trade (GATT) since 1948. They had never been applied in any serious or systematic way to agricultural trade, however, not least because in an earlier day the United States did not want them to. The URAA began to integrate or normalize agricultural policy into the framework that applied to many other traded goods already.

Agricultural policies, especially those which disburse money or affect trade or both, have a tendency not to be transparent. Perhaps my colleague can assure us that European practices are perfectly pellucid and always have been, but honesty compels me to admit that some U.S. policies have been less than transparent – murky, in fact. (I have designed a few of them myself.) In any case, the URAA wisely puts emphasis on quantifying policy effects as a way of disciplining them. Admittedly it is not always clear how this should be done, and the exercise itself provides opportunities for mischief: Witness the process of “dirty tariffication” by which countries after the Round exaggerated the amount of protection inherent in their earlier policies in order to have a higher base from which to make the requisite reductions.

Nevertheless, quantification had to be done and it was done, and countries began implementing the cuts required by the URAA. For industrial countries, this meant turning non-tariff barriers into tariffs, binding these and other tariffs, and reducing tariffs over six years by a cumulative 36%, with no tariff line cut less than 15%. For developing countries, the corresponding numbers were 10 years, 24% and 10%, respectively. Subsidized export volumes had to be cut 21% over the same period (14% for developing countries over 10 years), with the subsidies’ value cut 36% (24% for developing countries). Finally, domestic support had to be classified into one of three “boxes,” green, amber or blue, with cuts from the 1986-88 amber box base level of 20% over six years and 13% over 10 years for developed and developing countries respectively.

The U.S. Proposal

AFTER the failed Seattle ministerial, it was not obvious that the United States would make a comprehensive proposal for advancing agricultural negotiations. The desirability of comprehensive reform was not in doubt among most U.S. officials and farm

groups, but the absence of a comprehensive round, with its inherent opportunities for cross-sectoral trade-offs, made it a matter of some tactical debate whether the United States should put its energies into a broad-based proposal.

Generally, however, agricultural and food industry groups advised the Administration to make a bold proposal, in part as a means of generating momentum behind talks for which initial expectations were quite modest. And that was what the Administration did.

Market Access

The U.S. proposal, if adopted, would require that WTO members (1) reduce existing disparities in their tariff levels; (2) reduce or eliminate tariffs through annual reduction commitments; (3) simplify tariff structures; (4) eliminate agricultural safeguards, (5) make substantial increases in all tariff rate quotas (TRQs); (5) establish triggers for in-quota tariff cuts when “fill rates” are below certain levels; (6) reform import state trading enterprises (STEs) by ending monopolies and requiring transparency; and (7) ensure “transparent, predictable and timely” treatment of genetically modified organisms (GMOs) and other products of new technologies.

Export Competition

The centerpiece of the U.S. export competition proposal is, of course, the elimination of export subsidies. Specifically, the proposal calls for countries to (1) eliminate export subsidies through annual reduction commitments, (2) reform export STEs in a manner analogous to the proposal for import STEs, and also end government funding for these STEs, (3) prohibit export taxes, including differential export taxes, as a means of gaining competitive advantage or managing supply, and (4) negotiate export credit programs, but in the OECD rather than in the WTO.

Domestic Support

The U.S. proposal would eliminate the various colored boxes of URAA parlance, and classify all support as “exempt” or “non-exempt.” Exempt measures would generally be those now in the “green box,” although the proposal foresees some fine-tuning based on experience since the last Round.

Non-exempt support would be subject to reduction commitments. In sharp contrast to the URAA, these commitments would not be simple percentage reductions from a historically determined base level. The base level would still be set, but the proposal would require that countries reduce support measures until they constituted a fixed percent of each country's agricultural production value – and this ending percentage would be the same for all WTO members. Annual reduction commitments, then, would be sharply higher for more subsidized countries than for those with initially lower subsidy levels, since the former set of countries would start from a higher base but everyone would be moving toward the same goal.

Special and Differential Treatment

The U.S. proposal would give least developed countries “special consideration” in implementing market access commitments, presumably with respect to either required cuts or timetables or both. The proposal also contemplates special categories of exempt support (for example investment and infrastructure programs) available only to industrial countries.

Food Security

The U.S. proposal explicitly views more open trade as conducing to greater food security. However, it goes slightly beyond preferring interdependence to autarky. It calls for a renewal of the URAA disciplines on food aid and advocates “strengthen[ing] substantially” the existing disciplines on export restrictions, as a means toward more reliable global supplies.

U.S. Private Sector Views

THE initial reaction to the U.S. proposal among farm and food groups in this country was favorable. There is always a range of views, of course, but the proposal had considerable political appeal to the U.S. agricultural sector – perhaps not a coincidence in an election year.

With all the usual *caveats* about generalizing the views of other people, here are some statements that describe the views of many

U.S. agricultural and food industry groups, not only on the U.S. proposal but, more broadly, with respect to the climate in which the current WTO negotiations are conducted.

Farm groups place a strong emphasis on eliminating export subsidies. No facet of the U.S. position has so united the private sector as this one. Of course, to most U.S. farm groups “export subsidies” do *not* include export credits, though to many they do include export STEs.

U.S. farm organizations believe many non-tariff trade barriers remain to be conquered, despite the URAA rules. I regret to inform my European interlocutor that they do not see the European Union as blameless in this regard; one thinks of bananas, beef and GMO approvals.

Many groups are quite suspicious of “multifunctionality” and similar concepts relating to the non-economic importance of agriculture and rural areas, seeing these catch phrases as stalking horses for new import barriers. This is not a universally held view, though, and some farm groups can see the utility of multifunctionality if only it were called something else.

Farmers and ranchers tend to have the feeling that producers in other countries are more subsidized than they are. This perception exists not only where it is probably true – in comparison to EU producers, for example – but also where the official numbers suggest it may not be – in comparison to Canada and Australia, say. I bring up this view not to start an argument, since this particular argument is never-ending, but to demonstrate why the U.S. proposals to smooth out tariff disparities and set a common percentage for maximum domestic support find a receptive audience here.

Along with this feeling that others are more subsidized goes the corollary view that the United States has more to gain than lose from reducing trade barriers. In turn, this view is linked to a preference for a broad-based round, not talks limited to the built-in agenda. This preference makes sense, from the U.S. standpoint, if it conduces toward trade-offs among different economic sectors: Farm groups feel the U.S. has less to give and more to gain than the EU and Japan in agriculture, but may be better able to engage those nations in serious bargaining when other industries are in play.

Finally, most U.S. farm and food industry groups have shown reluctance to see labor and environmental issues introduced into WTO negotiations. This reluctance is not universal, and some groups have taken the opposite tack, but I would judge that the reluctant

camp is in the majority. More or less the same constellation of groups is skittish about special and differential treatment, noting that for some commodities – notably the soy complex – developing countries are fierce competitors already.

Some Observations

IN a way, WTO negotiations are easy to predict accurately. One can say: “Progress, if any, will take years,” and be correct about 90% of the time.

In another sense, prediction is hazardous. The Uruguay Round was frequently pronounced dead but finally brought significant accomplishments. Last December, the entire WTO was pronounced dead for a few days, but since then the outlook has become a bit less stark. I think I will limit myself to observations rather than predictions, which I will save for the question period. Since no transcript will be made, it will then be harder for someone to prove me wrong a few years or months hence.

It is useful to remember the factors that helped propel the Uruguay Round. Low prices and large surpluses characterized most commodity markets. An export subsidy war was raging between the United States and Europe. Not entirely by coincidence, both U.S. and EU agricultural budgets were under pressure, and the incentive to limit spending on both sides of the Atlantic was strong. The necessity of fiscal restraint, in turn, created an incentive for multilateral reforms, not only because their substantive effect might be desirable, but also because they would permit developing countries to receive credit for cuts they would have had to make anyway.

Some of these factors are still with us, but others have changed. The United States has largely abandoned its Export Enhancement Program. Some would say it has largely abandoned fiscal discipline too, as farm assistance has soared to virtually unprecedented levels in the last few years. And today’s debates feature issues, such as GMOs, that were barely thought of in the last Round.

One legacy of the Uruguay Round was a multilateral structure that puts a premium on “decoupled” support. This kind of support

is not linked directly to current production levels, crop choices or market prices. Among agricultural economists, decoupling was long considered the Holy Grail of policy because it would accommodate politicians' need to help farmers while letting markets operate unimpeded.

Thus decoupled payments and other "green box" measures were exempt from reduction. They could not only enhance incomes but ensure export competitiveness. They were consistent with what seemed to be the steady march of U.S. farm laws: The bushel-per-acre yields used to pay farm subsidies were decoupled in the 1985 farm legislation; the next major farm law in 1990 brought substantial decoupling on about 15% of each farmer's land; and the 1996 "Freedom to Farm" law seemed to complete the job, decoupling benefits almost entirely.

But such a policy turned out to be far easier to sustain when corn was \$4 a bushel than when it was less than \$2. Because of the way U.S. price supports work, a category of "amber box" payments called loan deficiency payments grew from zero to \$8 billion in the space of a year as prices fell. Congress discovered an unexpected emergency for three consecutive years and, in each case, addressed it through several billion dollars of payments to supplement decoupled income support.

In a way, this environment makes the Administration's willingness to make a bold liberalization proposal surprising and admirable. (This is a difficult thing for a Republican to say.) But it also raises questions about just how much the United States will really want to reduce support levels, multilaterally or otherwise. When the U.S. budget deficit was large, farm programs were a vulnerable target for Congressional budget cutters and the trend in benefit levels for U.S. producers was downward. In today's combination of perceived farm distress and readily available budget surpluses, it is hardly clear that this downtrend remains in place.

There are some related considerations that are independent of budget politics in the United States. If the imperative of international trade agreements is to put a premium on decoupled assistance and disfavor other means of supporting producers, one effect is to give an advantage to developed countries with well-supplied Treasuries. Developing countries are being encouraged to abandon protectionism and market-distorting measures, and are assured they can still help their producers if they choose – all they need to do is

spend large amounts of public money. This is a little easier to pull off if you are the United States or the European Union than if you are Cuba or Zambia.

If you are observing the United States over the next few years, two factors are worth watching, in addition to the obvious factor of who wins the coming elections. First, decisions and imperatives at the highest levels of government will be critical to whether a new Round is launched with agricultural liberalization as a centerpiece. Will the next U.S. President make trade negotiations a personal priority and exert leadership in the ways available only to heads of state and government, not to lesser ministers?

Second, the U.S. view of trade talks will be influenced by – and will influence – the next rewrite of farm laws, due in 2002 but increasingly likely to begin in 2001. At this point, some retreat from the principles of decoupling seems likely. A relatively expensive farm bill is also probable, but at the same time the Brobdingnagian spending levels of the last two years will prompt a partial backlash, causing Congress to look for ways to limit spending. In this context, the kind of new and additional spending commitments that would be required for a full-scale revival of the EEP or similar tools are improbable. But a relatively expensive farm policy *is* probable. In sharp contrast to what some observers at the time expected, the Freedom to Farm law is not destined to be the end of U.S. farm programs. That reality will affect both the tone and the substance of U.S. trade negotiating policy in the coming years.

Trade in Agriculture

GERARD KIELY

*Counselor (Agriculture, Fisheries and Consumer Affairs)
European Commission's Washington Delegation*

I find there is often a lack of appreciation as to the EU philosophy behind its support for agriculture and underlying the Common Agricultural Policy (CAP). I feel sometimes that there is a perception that the CAP is designed as a great farmers' gravy train, pumping huge amounts of money into farmers' pockets encouraging them to produce massive surpluses which are then dumped onto the world market at give-away prices while a giant barrier prevents imports into the EU.

The Multifunctional Nature of Agriculture

IN Europe we no longer see agriculture as merely having an economic role, although I don't want to understate the importance of this. If it was merely economic considerations which had to be taken into account, then the arguments put forward by many would carry more weight, i.e. abolish all support and market protection and let the market decide on the basis of "survival of the fittest". Of course even if one were to accept this argument, this approach would wipe out about two-thirds of our farmers overnight, leading to a major decline in production and an increase in prices and imports.

Nobody can seriously question that farmers and agriculture have many and diverse roles to play all of which we take account of in

our agriculture and rural development policy. As well as being a producer of a rich variety of high quality and safe foods, it also has the key and growing role in protecting the rural environment, preserving rural landscapes and contributing to the socio-economic development of rural areas, including the generation of employment opportunities. These are services for the public good, services the public expects and indeed demands. It is only right therefore that these services are paid for by the public, as is done in the EU through the CAP.

An integral part of the rural landscape is the rural population. There isn't a country in the world which is not confronted by urbanization and rural depopulation. In this sense we are no different other than the fact that we still have rural areas more densely populated than most other developed countries and we want to keep it so because it is right. In this context agriculture, together with its upstream and downstream industries, has a crucial role to play. Agriculture is the backbone of our rural areas in terms both of economic activity and rural population. I fully recognize that in many parts of the EU agriculture alone cannot sustain economic and social vibrancy which is why the EU is focusing more and more on the development of off-farm employment opportunities. Essentially we have taken the view that there is a social, economic and environmental cost both to urbanization and rural depopulation, and spending 0.5% of our Gross Domestic Product, which is the cost of the CAP, is a small price to pay to avoid exacerbating this problem. Our cities ignore this cost at their own peril (higher budget outlays in the long term, weaker socio-economic cohesion...). In discussing the economic arguments against supporting agriculture, no one ever seems to take account of the cost of providing under-utilized infrastructure in rural areas while at the same time having to invest ever increasing amounts of money in cities to cope with urbanization.

This was the philosophy upon which we based our agricultural policy reforms in 1992 and 1999, whereby we progressively reduced support prices, increased direct aids to farmers, which are becoming more decoupled from production and where environmental considerations are coming more and more to the forefront. Taken together, these reforms amount to a major change in direction for our agricultural policy. The new focus is now on the multifunctional nature of agriculture rather than on its food-producing role.

Perspectives for a New Round of Negotiations

I think it is important that we all enter these negotiations with realistic objectives rather than some unattainable wish list which could ultimately jeopardize the round's success. The EU has every intention of participating in these negotiations in a constructive way with a view to achieving a far-reaching broad-based agreement. Aiming for a broad based agreement is in my view and indeed in EU's view crucial for the success of the Round, as it will leave WTO partners more room for maneuver in the context of a global package. If the minimalist approach is taken, then it is obvious that any agreement irrespective of its content is going to result in winners and losers and therefore will not be acceptable to some. Furthermore, since all WTO members seem to agree that trade liberalization is economically beneficial, surely it follows that a liberalization of many sectors is more beneficial than that of a few.

The inclusion of agriculture is very sensitive for the EU but yet we have the unanimous agreement of our Member States that it be included and that we engage in serious and constructive negotiations on the subject.

CAP Reforms in the EU

Anyone who has followed the CAP reform negotiations in the EU will appreciate the difficulty we had in reaching that agreement. Signing up to a WTO deal which would imply going back to the drawing board on Agenda 2000 is not an option. The EU has decided at the Heads of State Summit in Berlin that "the decisions adopted regarding the reform of the CAP within the framework of Agenda 2000 constitute essential elements of the EU's position for the future multilateral trade negotiations at the WTO". In other words, we are not prepared to accept that the outcome of these negotiations jeopardizes or undermines our policy which supports the multifunctional role of European agriculture. Nor are we prepared to undertake at this stage a new CAP reform before the ink is dry on the agreement we reached in Berlin as our contribution to the WTO Round. To treat agriculture like any other trading sector is not an option. It would spell the end of most family farming.

I believe that, given the time and effort which was put into creating the framework for classifying various agricultural measures in the Uruguay Round, we should maintain this approach although this does not preclude an examination and clarification regarding certain aspects, such as eligibility criteria for the blue box, green box, and so on. We should not, however, waste time reinventing the wheel; let's build on the foundation we have already constructed.

Crucial Elements for the EU

The crucial elements for the EU will relate to market access, export support, domestic support, blue box, green box and the peace clause.

MARKET ACCESS

All of the medium to long term projections indicate a growing global demand for food, and the EU intends to participate in meeting that demand. We recognize that we can only do this by making our products more competitive which was one of the objectives of the Agenda 2000 reforms. However, some WTO members create obstacles to imports sometimes quite subtle impediments – which we will be seeking to have removed. On our side, while we are already the world's largest importer of food and agricultural goods, we will not be inflexible on this point.

Again, however, I have to advise caution on the part of our trading partners with regard to their expectations in this area. For the reasons I outlined earlier, the EU intends maintaining an internal price regime which combined with other measures serves to support our over 7 million farm families. In many cases therefore, our prices will be higher than world market prices which will restrict our ability to export. Given that we are self-sufficient in most agricultural products, any increase in imports implies a displacement of internal production which must be exported to a lower priced market. As this may not be possible due to other WTO constraints, an increase in imports could imply higher EU food stocks or more constraints on EU producers. As you may well appreciate, neither of these options are very attractive either for producers or for EU governments.

There are limits therefore as to how far the EU can go on this point. You can derive them from the Agenda 2000 negotiations. I

don't need a crystal ball to know we will be criticized on this point however. But do not forget that the EU is the largest importer of food and agricultural products in the world and is one of the most remunerative markets for these products. Furthermore, a major part of these imports enter the EU under preferential import arrangements and hence very low levels of duty. I'm tired of hearing the same old "rhetoric" usually from the same sources – that the EU is a fortress when it comes to food or agricultural imports.

EXPORT ASSISTANCE

Equally, the EU is prepared to negotiate on export refund constraints. Although I have to say now that their total abolition as suggested by some is not a realistic scenario. We accepted and respected fairly severe cutbacks in this measure in the Uruguay Round, and Agenda 2000 should allow us to make a further contribution here. However, and I must stress this, we are not prepared to accept further disciplines on export refunds only; all forms of export assistance must be subject to the same rules, including export credits, food-aid on credit concessional terms, state trading enterprises and any other measures which contribute directly or indirectly towards subsidizing exports.

DOMESTIC SUPPORT

For the EU, domestic support, the blue and green boxes are all part of the same equation. We are ready to discuss reductions in market support but only in the context of the continuation of the blue and green boxes. There should be no doubt in anyone's mind as to our determination on this point. Furthermore, it should be obvious that movement by a number of WTO members on other aspects of the negotiations, such as market support and export assistance, depends fundamentally on facilitating non-trade distorting support for producers.

PEACE CLAUSE

Finally, the EU will also be insisting on extending the duration of the peace clause. There is little benefit for us if, at the end of the negotiations, we have made concessions on the basis of certain un-

derstandings regarding the security of our own measures only to have them eroded later through WTO panels. There must be legal security on mutually accepted commitments.

Beyond the classic issues of support and trade, we believe this WTO round will have to address other issues which are of concern to the public and have a bearing on trade and competitiveness. I am referring here in particular to what the public considers to be food safety aspects as determined by the method of production.

Objectives of Multifunctionality

The European model of agriculture is based on multifunctional farming and thus offers a more future-oriented perspective for agriculture than mechanical calls for a total liberalization of farm trade. Understanding multifunctionality as a synonym for protectionism and unfair competition would be a serious mistake. The EU Council has defined our European model in such an explicit manner, that it should leave little space for misunderstandings. It basically describes a general set of objectives:

- A competitive agricultural sector, which can gradually face up to world markets without being over-subsidized.
- Production methods which are sound and environmentally friendly, able to supply quality products that the public wants.
- Diversity in the forms of agriculture, which maintain visual amenities and support rural communities.
- Simplicity and transparency in agricultural policy, and sharing of responsibilities between the European Commission and EU member-states.
- Justification of farm support through the provision of services that the public expects farmers to provide.

All of the above objectives not only reflect generally accepted policy targets, but also fall clearly within the scope of Article 20 of the Uruguay Round Agreement on Agriculture, that sets the agenda for further agricultural policy reform.

Multifunctionality is the word we have found in Europe to describe the fundamental link between these objectives, between sustainable agriculture, food safety, territorial balance, maintaining the landscape and the environment and what is particularly important for developing countries, food security.

This direction of reform has been developing a consistent and predictable policy line without ad hoc adaptations to market shocks. The experience to date of the shift from price support to direct payments in the reformed sectors has been globally positive.

Reducing price support has brought farmers more in touch with the market. They are now basing input and output decisions more on market signals and less on intervention at a guaranteed price. Market balances have improved and a more rational use of fertilizers and other chemical inputs has been observed. Consumers have benefited from lower prices since part of the support burden has been shifted from consumers to taxpayers. Budget expenditure has become more stable and predictable with the volume of direct payments being set and support to farmers has become more transparent.

Rural Development

Agenda 2000 identified rural development as a major if not the biggest challenge for the future and reinforced three main objectives for EU rural development policy. It should facilitate the structural adjustment of the farm sector, favor the integration of environmental concerns with agricultural activity and promote the diversification of on- and off-farm activities. Agenda 2000 has brought all relevant measures into one policy framework which is now called the second pillar of the CAP.

Taking up WTO Negotiations

AGRICULTURAL trade is of particular importance to the EU since we are the world's biggest importer and second biggest exporter of agricultural products. Over the last decade, EU agriculture and food industry have been major beneficiaries of the developments on world markets, in particular for high-value-added processed products.

But before entering into the specifics of our agricultural position, it is worth recalling the general priorities of the European Union. Central in these priorities is the preference for a comprehensive trade round, with a time-bound framework. Such a round would allow the necessary trade-off among sectors and interests that would enable all WTO participants to meet the commonly defined objectives and to benefit from the results. Since all WTO members seem to agree that trade liberalization is economically beneficial, it should be clear that a liberalization of many sectors is more beneficial than that of a few.

This, however, cannot be achieved without developing the role and capacity of the WTO, neither could it be achieved without the WTO addressing wider issues such as the relationship between trade and public health or environment. Meeting such complex objectives would not weaken, but strengthen the WTO multilateral system in the long run and its acceptance by the citizens.

We have to keep in mind that citizen and consumer concerns are the backbone of market developments and political actions. Let us take the European discussion on food safety as an example. The European consumers have made some substantial negative experience in this field although policy has always tried to stabilize and enhance the high level of food safety in Europe.

Moreover, the legitimacy of WTO decisions must be clearly demonstrated and the decision-making process made easy to follow. Transparency must be increased, and as we enter the 21st century, world trade is no longer just the domain of the industrial countries. The EU believes that developing countries should get special treatment. We are already offering major preferences and we are prepared to extend duty-free access to virtually all imports from least developed countries.

The EU expects agricultural negotiations to strike a balance between traditional trade and new non-trade concerns that reflect a follow-up of the Uruguay agreement. A future WTO agreement must lead to further agricultural trade liberalization while at the same time allowing WTO partners to maintain a policy that respects and fulfils their domestic priorities.

Domestic Support

The Uruguay Round provided specific instruments that classified measures of domestic support according to the level of trade distor-

tion that they introduce. These measures fall under the three “boxes”: the green, blue and amber box. Naturally, the next agreement would have to answer to the question of whether any of the specific instruments provided in the Agreement itself need to be adapted.

Our view is that a major review of the specific instruments provided in the Uruguay Round is neither necessary nor desirable. This position does not rule out some updating of the blue and green boxes. But it stresses the continuation of the present distinction of policies according to their degree of trade-distortion as the essential element to move away from support linked to prices or products towards more transparent and non-distorting support policies.

The EU is well prepared for some tough negotiations on the blue box. The direct payments introduced by the 1992 reform fall into this category and the Agenda 2000 reforms represent an increase of the blue box. An abrupt elimination of support would threaten the economic and social stability of many intermediate and peripheral regions, where agricultural activity is still important, and could entail serious environmental risks. Direct payments therefore provide a cushion which allows the farm sector to adjust to a new, more market oriented environment without major disruptions. These payments play an important role in encouraging European farmers to adapt to new conditions. The blue box is a crucial component of the CAP and I think we have been clear enough to our negotiating partners about that.

Market Access Issues

The European Union as a major food exporter in the world intends to share in the forecasted expansion of world agricultural trade. The EU will seek to obtain improvements in opportunities for its exporters, among other things through greater clarity in the rules for the management of tariff rate quotas (TRQs), including imports through single desk buyers, and the removal of other unjustified non-tariff barriers.

The latter include the protection of geographical indications, to ensure that EU exports do not face unfair competition from deceiving practices such as the use of well-established EU denominations. Linking products to the region of origin and to traditional methods of preparation is a valuable feature of European agriculture which responds to consumer demand.

Surprisingly perhaps for such an important food producing country, the EU protection of geographical indication or designation of origin is only used in Ireland for two products, Imokilly Regato cheese and Clare Island Salmon, but hopefully there might be other products for which it will become important in the future.

Non-trade Concerns

A wide range of issues touches upon different WTO agreements: the Sanitary and Phytosanitary Agreement (SPS), the Agreement on Technical Barriers to Trade (TBT), the Agreement on Trade-related aspects on Intellectual Property Rights (TRIPS). From all these issues, undoubtedly the most controversial has been the area of measures related to food safety concerns and their impact on trade. Recent WTO case law has confirmed that non-discriminatory, science-based measures to achieve the level of safety determined by members are in conformity with that agreement.

It might be useful to confirm this in a more general manner in order to assure consumers that the WTO will not be used to force onto the market products about whose safety there are legitimate concerns. What the EU experience of recent years has demonstrated is that consumer perceptions on issues related to food safety, which undoubtedly have a direct impact on trade, are not viewed as such, but as health issues by the general public. Thus measures that aim at incorporating these concerns into future trade agreements should not be viewed as trade impeding. On the contrary these measures are in the long term trade enhancing.

Conclusion

BUT the most fundamental non-trade concern that needs to be addressed in the next WTO negotiations on agriculture for the EU is the recognition of the multifunctional role of agriculture. As mentioned earlier, it is not just the production of food, feed and fiber, but also the preservation of the rural environment and landscape, animal welfare, and agriculture's contribution the viability of rural areas and to a balanced territorial development, that represent legitimate policy objectives. It is our intention to meet these

objectives by policy measures that are tailored to meet specific goals in the least trade distorting way. With Agenda 2000 the EU has shown its willingness to reform the CAP.

Agenda 2000 is our way to respond to consumers' expectations, promote competitiveness on internal and external markets, put special emphasis on sustainable production and on improving living conditions, and to introduce a new way of sharing responsibility with the Member States. To sum it up, the objective is to strengthen the multifunctional role of agriculture in Europe. This objective requires a certain budget which cannot be taken away without jeopardizing the process of reform and it will require some serious work of negotiation at the international stage.

Agenda 2000 and the McSharry reform of the Common Agricultural Policy moved in the same direction, making a significant shift from price support and supply control to a more targeted and less distorting agricultural and rural policy. This direction of reform has been developing a consistent and predictable policy line. If these developments are kept in perspective, there should be little doubt of the EU's clear commitment to move to a market oriented agricultural policy and towards further reduction of trade distorting measures.

As a major exporter and importer of agricultural products, the EU has a substantial interest in ensuring the success of a new round of trade negotiations, which must focus on a broad agenda if the outcome is to have any significant impact on the global economy. However, we all will have to work hard to make the outcome acceptable to the various interests represented at the WTO table.

TRIPS: Past, Present and Future

MODERATOR: ROWENA MARGARET S. GOROSPE, THE WORLD BANK

TRIPS: Past, Present and Future

LAWRENCE J. GOFFNEY, JR.

*Former Acting Deputy Assistant Secretary of Commerce
Deputy Commissioner of Patents and Trademarks
Former Assistant Commissioner of Patents
United States Patent and Trademark Office*

TODAY, companies identify and capitalize on business opportunities throughout the world. These opportunities are not in the so-called developed world alone. India is a prime example of how opportunities may be found in “developing” or “emerging” countries. The software industry in India has experienced a growth rate averaging 25% since 1991. Export demand in the United States and Western Europe account for the bulk of India’s software industry’s expansion. India has a substantial supply of skilled computer personnel to meet those demands, particularly for the United States where the demand for computer personnel is greater than the supply. And American businesses like the labor costs of one-tenth the labor costs in the United States.

United States policy of providing adequate international protection for intellectual property rights stands out in the Clinton Administration’s trade policy, which is to promote capital formation, foster growth, create jobs, raise standards of living for working Americans, and assure strong protection of intellectual property throughout the world. Whereas the other components of the policy are expressed as domestic goals, intellectual property policy is reflected as an international goal. Of course, the consequence of meeting this goal would be that the many Americans who own intellectual property interests would be able to exploit those interests, when

vested as intellectual property rights, throughout the world and tip the balance of trade to the United States economy.

The information age, however, has brought with it a whole new context of doing business internationally for every country on the globe. It is the age following the industrial age, which began with the movement of goods and services on a slow boat to China and ended with non-stop jet service to Beijing. Despite this remarkable evolution of the tools of trade, the information age has brought about a quantum leap ahead for trade over the movement of goods and services at the height of the industrial age. Providing goods and services to distant markets can now be virtually instantaneous through the movement of information.

A transpacific telephone call, an email, or a videoconference can transfer information about how to make and use goods and how to provide and manage services faster than a rocket circling the earth. The operations of a business can be conducted halfway around the world using local people who can be given information on how to provide the services of the business and on how to make and use and, indeed, sell the goods of the business. Consider the explosion of American franchises in other countries. Consider the manufacturing and sales of "foreign" automobiles in this country.

Businesses can afford to forego providing goods and services to foreign markets if they nevertheless receive the profits of those markets. How can that be done? A U.S. business can provide information to a foreign business, for which the foreign business pays, and the foreign business provides goods and services to its own local market. The foreign businesses employ service providers locally and exploit local materials for goods (an incentive for information suppliers to discover ways of cultivating raw materials in countries that are equal to or improve upon the materials used to manufacture goods in this country, as by genetic engineering or developing synthetic materials). The foreign businesses can make profits over their expense of license fees to U.S. businesses, and the U.S. businesses can provide goods and services in their own local markets for additional profits. In theory at least, economies around the world grow, and those who continue to have information to sell profit the most. Not only are they able to profit on paper, but also, if the economies of the nations of their customers grow, their customers will be able to pay for information without drawing on loans, which are rarely paid, from the nations of the information suppliers.

This, to many economists, is why the information age represents progress.

But information when given is no longer exclusive to the information provider—that is, unless the information is protected as property. This is where intellectual property comes in. Intellectual property is another name for “information property.” A patent is property in information about how to make and use inventions. A trademark is property in information about the nature and quality of goods and services. A copyright is property in the form and structure of information that informs and entertains. A trade secret is information kept secret, for which certain property like rights may be asserted.

Intellectual property protection is needed to trade information. The member countries of the World Trade Organization know this. That is why the WTO member countries, by joining the WTO, have agreed to minimum standards for their intellectual property regimes. In the context of such opportunities and government support, the U.S. Government and the U.S. business community has supported the development of an international regime of intellectual property rights tailored to meet their needs in global markets that include both industrial and developing countries.

Intellectual Property Rights

When a holder¹ of intellectual property rights chooses to allow others to use of his, her, or its intellectual property, the intellectual property laws provide control of the use beyond agreements between the holder of the rights and others. In the United States, some of these laws were developed to give authors and inventors property in information for respective limited times so that at the ends of those respective times the public may have free access to and use of the information. Some of these laws were developed to allow merchants to use information in the form of designations such as names, symbols, and packaging to distinguish their products and services

¹ A “holder” or intellectual property rights may be an inventor or author or the recipient of a transfer of ownership of intellectual property.

from others, so long as the designations are distinctive of those goods and services. Still other laws were developed to allow holders of information not known to be available to others to confidentially disclose the information and still keep control of it, so long as others do not independently gain legal access to the information and disclose it to the public. Thus, all of the United States' intellectual property laws mean to strike a balance between the ability of intellectual property holders to use their property and the right of the public to have free access to new ideas and forms of expression. U.S. laws offer intellectual property holders a range of intellectual property laws, including copyrights, patent protection, trademark protection, and trade secret protection. Many intellectual property holders use two, three or all of these protections as a basis for licensing information in return for profits or royalties.

Copyrights

Copyrighting information protects forms of expression of information, such as music and other listening arts, visual arts, and manuscripts. The protection is also readily adaptive to protecting the instructions of computer operations that are source and object codes, as well as protecting a program's structure, sequence, and organization. Copyrighting software is protecting information about technology rather than protecting information communicated through technology, but to a certain extent. Copyrighting software is protecting the information about how to make and use technology beyond protecting *the expression* of information about how to make and use technology. Codes and programs are not only instructive; they are operative of a computer function. One enters a program into a computer memory and the computer is reconfigured to operate, that is to say, to function, in the manner of a machine built to operate according to the programmed functions. And so, notwithstanding that copyrights are not meant to protect the functional, utilitarian aspects of software, as a practical matter and to a certain extent, copyrights do indeed protect functional aspects of software.²

² As a practical matter, this may be so even if as against the software of others who have independently developed the product. If the code, less the uncopyrightable portions of it, is substantially similar to that of the holder's software product, the others may incur substantial legal bills to prove the originality of their product. This is significant to software licensing in that others, on a risk/cost basis, might rather license software than face the legal hurdles of trying to develop around it.

Copyright protection allows only the holder of a copyright, and those licensed by the holder, to reproduce the copyrighted work — the work is the music, play, dance, manuscript, audiovisual display, or software — in copies, to produce derivative works based on the copyrighted work, to distribute copies of the copyrighted work, and to perform or display the copyrighted work publicly or, in the case of sound recordings, to display the copyrighted by means of a digital audio transmission. All of these rights come with little or no formal procedure. Under United States law, a copyright in a work exists the moment that the author — the composer of music, the choreographer of dance, author of the software — creates it, without the developer's having copied it from someone else, in a form that is stable enough to be stored in some way. The copyright does not have to be registered to subsist,³ and registration of a copyright involves paying the government a relatively inexpensive fee. Still, the scope of copyright protection falls short of patent protection when patent protection is available, affordable, and practicable within the time that the protection is needed.

Patents

Patents more directly protect information about how to make and use an invention, whether the invention is of a new and nonobvious mousetrap, a medicine, a synthesized gene, software, or a method of doing business over the Internet. The exclusive rights that the owner of a patent enjoys are the rights to prevent others from making, using, offering to sell, or selling the patented software within the United States or importing the patented products or products produced by patented processes into the United States. These exclusive rights are for the term of the patent, which is a period of 20 years less the time taken to prosecute (process) the application from which a patent issues. The three basic types of patents that are available are utility patents, plant patents, and design patents.

³ Under 17 U.S.C. § 408(a) registration of the copyright is permissive, not mandatory as a condition of copyright protection. With some exceptions, however, registration of a copyright is necessary to bring an action for infringement of a copyright. 17 U.S.C. § 411(a). Moreover, certain remedies are not available for infringements before registration. 17 U.S.C. § 412.

Utility patents cover inventive machines, articles of manufacture, compositions of matter, processes, business methods, systems, and functionally useful algorithms, including applied mathematical formulas. Plant patents cover distinct and new asexually reproduced varieties of plants, including cultivated spores, mutants, hybrids, and newly found seedlings, other than tuber propagated plants or plants found in an uncultivated state. Design patents cover the graphical or ornamental designs, including aspects of a screen display on a computer (but not the functional aspects of screen displays or the portions of computer code accountable for the display).

Only a few years ago, patent protection for computer software was far less utilized than copyright protection and there were rare occasions when patent protection machine arise for accounting type of methods ("methods of doing business"). The United States Patent and Trademark Office (the "USPTO") and to some extent the courts were reluctant to recognize software (and business processes using software) as subject matter than can be patented. The reluctance has been overcome by decisions by the Court of Appeals for the Federal Circuit and by a policy shift by the USPTO.

Trade Secrets

When information of value is not readily known to others, it provides a competitive advantage. Reasonable efforts to maintain the secrecy of such information qualify the information for trade secret protection. Processes for manufacturing goods, methods of doing business, customer lists, and computer code may be treated as trade secrets if the information kept secret cannot be obtained except from a party holding the information secret. If it can be obtained in good faith independently of the holder of the trade secret, it no longer qualifies as a trade secret. One means of independent discovery is by reverse engineering. Information contained in a patent (which, according to statute, must be fully disclosed, including the best mode of carrying out an invention) cannot qualify as a trade secret. Any information that becomes general knowledge is forever lost as a trade secret. As with the other forms of intellectual property, trade secret protection is used in combination with other forms of intellectual property.

Trademarks

Finally, information about the nature and quality of software products and services is an advantage where such information counts most — in the market place. Trademarks and service marks protect such information. A software product name like “Microsoft” is invaluable information about a software product. It tells a purchaser something of the level of engineering and support that the purchaser expects to come with the software product. It also tells the purchaser such things as the product’s ability to run in certain operating systems and with other software products and its general interoperability. The “golden arches” or the signage “McDonald’s” tells a fast food consumer something about the level of service and about the menu in a fast food restaurant. Symbols, devices, and a combination of these provide the same information. Thus, the owner of a trademark has a measure of exclusivity on such information from competitive and can keep the trademark from use or misuse by others. Under U.S. law, trademark registrations cover an initial ten-year period, with renewable ten-year periods so long as the trademark remains in use.

TRIPS

THE Agreement on Trade-Related Aspects of Intellectual Property Rights⁴ came into effect on January 1, 1995.⁵ By its existence, it establishes minimum standards of protection for each cat-

⁴ Agreement on Trade-Related Intellectual Property Rights [hereinafter referred to as “TRIPS”], Annex 1C, Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, signed at Marrakesh (Morocco), April 15, 1994, in *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXT* (GATT Secretariat ed. 1994).

⁵ The World Trade Organization [also referred to herein as the “GATT”] entered into force with respect to the United States on January 1, 1995. See note 7, *infra*.

egory of intellectual property. These standards must be available in the national law of each member country of the World Trade Organization.⁶ Inasmuch as the United States was a major player in the negotiations leading to the establishment of the WTO, TRIPS substantially reflects U.S. policy on intellectual property. As will be later shown, TRIPS reflects much of U.S. intellectual property law. Each WTO member country must provide these standards on the basis of national treatment, which forbids discrimination between a member's own nationals and the nationals of other member countries.⁷ Each member country must also provide these standards on the basis of a most-favored-nation treatment, which forbids discrimination between the nationals of other member countries.⁸

TRIPS incorporates and extends to all WTO member countries the substantive obligations of the main World Intellectual Property Organization⁹ conventions. Those conventions are the Berne Con-

⁶ The World Trade Organization (WTO) is the institution established to facilitate the implementation, administration, and operation of and to further the objectives of the TRIPS. In particular, the WTO serves as a vehicle to ensure a "single undertaking approach" to the results of the Uruguay Round so that membership in the WTO will automatically entail accepting all the results of the Uruguay Round without exception. The Marrakesh Agreement Establishing the World Trade Organization was the Final Act Embodying the Results of the Uruguay Round of the Multilateral Negotiations, signed at Marrakesh. The WTO Agreement entered into force with respect to the United States on January 1, 1995.

⁷ Article 3 of TRIPS. See note 9, *infra*.

⁸ Article 4 of TRIPS. Exceptions to the national treatment obligation and exemptions to most-favored-nation treatment are permitted. For example, notwithstanding that terms of member countries for copyright protection may be in excess of the minimum term required by TRIPS, TRIPS only requires that a member country, without legislation to the contrary, provide a copyright term given by the country of origin of the copyrighted work. It is likely that a national of one country would have his, her, or its work originated in that country, while the national of another country would have his, her, or its work originated in the other country. Consequentially, if the copyright terms for the two countries differ, so might the treatment of the two nationals' claims.

⁹ The World Intellectual Property Organization (WIPO) was created in 1967 as one of the 16 specialized agencies of the United Nations. WIPO's mission is to promote the protection of intellectual property throughout the world by administering multilateral treaties and creating model laws for adoption by developing nations.

vention¹⁰ on copyright and the Paris Convention¹¹ on industrial property, with the addition of other obligations on matters where it was thought a more adequate protection for intellectual property would relate better to trade. A particular advantage to trade as a feature of TRIPS is that member countries are required to provide within their national laws effective procedures and remedies for the enforcement of rights to the holders of those rights, mainly businesses, including software businesses.¹²

TRIPS has three parts. Part I sets out general provisions and basic principles, notably the national-treatment commitment and the most-favored-nation clause.

Part II addresses each intellectual property right in succession. TRIPS is a comprehensive multilateral agreement on intellectual property. It covers copyright and related rights, trademarks (which includes service marks), geographical indications (which includes appellations of origin), industrial designs, patents (which includes the protection of new varieties of plants), layout-designs of integrated circuits, and undisclosed information (which includes trade secrets and test data). The final section in Part II of TRIPS concerns anti-competitive practices in contractual licenses. It provides for consultations between governments where there is reason to believe that licensing practices or conditions pertaining to intellectual property rights constitute an abuse of these rights and have an adverse effect on competition.

Part III of TRIPS sets out provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures. Member countries are obliged to provide procedures and remedies under their

¹⁰ The Convention for the Protection of Literary and Artistic Works (the "Berne Convention"), signed at Berne, Switzerland, on September 9, 1886. The original text has been revised a number of times, the latest being the Paris Act of July 24, 1971. The Berne Convention entered into force for the United States March 1, 1989, with the Berne Convention Implementation Act of 1988, Pub. L. No. 100-578, 102 Stat. 2853, enacted October 31, 1988.

¹¹ Paris Convention was done at Stockholm July 14, 1967, entered into force for the United States Sept. 5, 1970, with the exception of Articles 1 through 12 which entered into force for the United States Aug. 25, 1973.

¹² However, member countries are not obligated to provide special judicial systems for the enforcement of intellectual property rights.

domestic law to ensure that intellectual property rights can be effectively enforced, by foreign right holders as well as by their own nationals. These procedures and remedies are to have provisions on evidence of proof, injunctions, damages and other remedies - including the right of judicial authorities to order the disposal or destruction of infringing goods, and to impose imprisonment and fines sufficient to act as a deterrent in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.

Substantive Standards of Protection

The substantive provisions of TRIPS were developed with objectives not unlike those of the intellectual property laws of the United States. These objectives are that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare, balancing rights, and obligations.¹³

COPYRIGHTS

As said, TRIPS incorporates provisions of the Berne Convention such as the subject matter to be protected, the minimum term of protection, and the rights conferred within permissible limitations.¹⁴ Developing countries are allowed, under certain conditions, to make some limitations to the right of translation and the right of reproduction.¹⁵

¹³ See Article 7 of TRIPS.

¹⁴ The Uruguay Round negotiations focused on the adequate basic standards of copyright protection of the Berne Convention at its existing level of protection under the latest Act, the Paris Act of 1971. Member countries are obliged to comply with Articles 1 through 21 and the Appendix of the Paris Act of 1971, which are the substantive provisions of the Berne Convention (1971). The Berne Convention's moral rights provisions, including the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honor or reputation—the rights conferred under Article 6*bis* of the Berne Convention—were not adopted by TRIPS.

¹⁵ See the Appendix to TRIPS.

At the outset, these standards adopt the substantive obligations of the Paris Convention and the Berne Convention as the main conventions of the WIPO. The Paris Convention and the Berne Convention are incorporated by reference by TRIPS.¹⁶ In addition, TRIPS requires a number of obligations that the Paris and Berne Conventions do not adequately address for protection and enforcement of intellectual property rights in an international trade context.

TRIPS provides for treatment of computer programs, whether in source or object code, as literary works under the Berne Convention.¹⁷ Accordingly, those provisions of the Berne Convention that apply to copyright protection of literary works apply to computer programs, and only those limitations that are applicable to literary works apply to computer programs. The form of a program, whether in source or object code, does not affect the protection.

The general term of protection for copyrights under the Berne Convention applies is the general term for TRIPS, which is the life of the author and 50 years after his death.¹⁸ This is the term for computer programs. TRIPS provides, however, that whenever the term of protection is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.¹⁹

TRIPS confirms that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts.²⁰ Compilations of data (databases) or other

¹⁶ The relevant provisions are to be found respectively in Articles 2.1 and 9.1 of the TRIPS.

¹⁷ Article 10.1 of TRIPS.

¹⁸ Article 7(1) of the Berne Convention as incorporated into the TRIPS Paragraphs 2 through 4. Article 7(6) of Berne allows countries to grant a term of protection in excess of the minimum term provided by the Berne Convention.

¹⁹ Article 12 of TRIPS. This limitation does not apply to photographic works or works of applied art, which are specifically provided for under Article 7(4) of the Berne Convention.

²⁰ Article 9.2 of TRIPS.

material are protected under TRIPS by copyright, notwithstanding that the compilations of data include data that is not protected under copyright,²¹ provided that the compilations by reason of the selection or arrangement of their contents constitute intellectual creations.²² Moreover, under TRIPS, databases have to be protected regardless of the form that they are in, whether machine-readable or other form.²³

Finally, specifically with regard to computer programs, TRIPS also provides that copyright owners have the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.²⁴

PATENTS

TRIPS requires member countries to make patents available for any inventions, whether products or processes, in all fields of technology. This availability is to be without discrimination, subject to the normal tests of novelty, inventiveness, and industrial applicability. TRIPS requires further that patents be available and patent rights be enjoyable without discrimination as to the place of invention and whether products are imported or locally produced.²⁵

Exceptions to this basic rule are permissible. Member countries may exclude inventions contrary to *ordre public* or morality. An explicit exception in this regard is for inventions dangerous to human, animal, or plant life or health or seriously prejudicial to the environment. This exception cannot be used to avoid the basic rule if only the commercial exploitation of the invention is prohibited.²⁶

²¹ Article 10.2 provides that such protection does not extend to the data or material itself.

²² *Id.*

²³ *Id.*

²⁴ Article 11 of TRIPS. The rental rights for computer programs are paired under TRIPS with a rental right for cinematographic works. With regard to the latter, the exclusive rental right is subject to the so-called impairment test by which a member country is excepted from this obligation imposed by TRIPS unless such rental has led to widespread copying of such works such that the copying materially impairs the exclusive right of reproduction conferred in that member country on authors and their successors in title. For computer programs, however, the obligation does not apply to rentals where the program itself is not the essential object of the rental.

²⁵ Article 27.1 of TRIPS.

²⁶ Article 27.2 of TRIPS.

Member countries may also exclude diagnostic, therapeutic and surgical methods for the treatment of humans or animals from being patented.²⁷ And as a final exception, member countries may exclude plants and animals²⁸ and essentially biological processes for the production of plants or animals²⁹ from being patented.³⁰ There is no basis for a member country excluding software as the subject matter of a patent.

A product patent of a member country must give the exclusive rights of making, using, offering for sale, selling, and importing, for these purposes, the invented product. A process patent must give rights to exclude not only the use of the process but also the products obtained directly by the process. TRIPS requires that patent owners have the right to assign or transfer by succession the patent,³¹ and TRIPS explicitly provides that patent owners have the right to conclude licensing contracts.³²

Just as with the subject matter of a patent, member countries are allowed to have limited exceptions to the exclusive rights generally conferred by a patent. Such exceptions may not, however, unreasonably conflict with a normal exploitation of the patent or unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.³³

TRIPS provides for a minimum term for a patent, which shall not end before the expiration of a period of 20 years from the filing date.³⁴ The 20 years is the minimum term that a member country must provide; there is no limitation regarding the maximum length of term.

Member countries are to require that an applicant for a patent disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art.³⁵ A

²⁷ Article 27.3(a) of TRIPS.

²⁸ The exception does not apply to microorganisms.

²⁹ The exception does not apply to non-biological and microbiological processes.

³⁰ Article 27.3(b) of TRIPS. A member country that excludes plant varieties from patent protection must provide an effective *sui generis* system for such protection. This final exception is subject to review by the year 2000.

³¹ Article 28 of TRIPS.

³² *Id.*

³³ Article 30 of TRIPS.

³⁴ Article 33 of TRIPS.

³⁵ Article 29.1 of TRIPS.

member country may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.³⁶

If the subject matter of a patent is a process for obtaining a product, TRIPS requires that the member country give the judicial authorities the power to order, under certain conditions, a shift of the burden of proof to the defendant, who has to then prove that the process of obtaining an identical product is different from the patented process.³⁷

TRIPS allows compulsory licensing laws and government use without permission from the holder of the patent rights, but such laws are to be made subject to conditions aimed at protecting the legitimate interests of the right holder.³⁸

PROTECTION OF UNDISCLOSED INFORMATION

TRIPS requires that undisclosed information, such as trade secrets or know-how, be protected.³⁹ The protection can only apply to information that is secret and that has commercial value because it is

³⁶ *Id.*

³⁷ Article 34 of TRIPS.

³⁸ See Article 31 of TRIPS. One such condition is the obligation, generally, to grant such licenses only if an unsuccessful attempt has been made to acquire a voluntary license on reasonable terms and conditions within a reasonable period of time. Another is the requirement to pay adequate remuneration in the circumstances of each case, taking into account the economic value of the license. Still another is a requirement that decisions be subject to judicial or other independent review by a distinct higher authority. Certain of these conditions may be relaxed where compulsory licenses are employed to remedy practices that a legal process has determined to be anti-competitive. *But see* Article 27.1, which requires that patent rights shall be enjoyable without discrimination as to the field of technology and whether products are imported or locally produced.

³⁹ TRIPS also contains provisions on undisclosed test data and other data whose submission is required by governments as a condition of approving the marketing of pharmaceutical or agricultural chemical products which use new chemical entities. In such a situation the member government concerned must protect the data against unfair commercial use. In addition, member countries must protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

secret.⁴⁰ Reasonable steps must also have been taken to keep it secret. TRIPS requires that a person lawfully in control of such information have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in a manner contrary to honest commercial practices.⁴¹

TRADEMARKS

Under TRIPS, a visually perceptible sign or combination of signs that is capable of distinguishing the goods and services of one undertaking from those of others is eligible for registration as a trademark.⁴² Words are a particular focus, but personal names, letters, numerals, figurative elements and combinations of colors, and any combination or combinations of all such signs must be eligible for registration by a member country as trademarks.⁴³

Member countries may require use before a mark can be registered. However, actual use of a trademark will not be permitted in a TRIPS regime as a condition for filing an application for registration. At least three years must have passed after that filing date before failure to use the mark as its use was intended may provide a ground for refusing registration.⁴⁴

TRIPS requires that the owner of a registered trademark be granted the exclusive right to prevent all third parties from using,

⁴⁰ Article 39.2 of TRIPS.

⁴¹ Examples of such practices are breach of contract, breach of confidence and inducement to breach, as well as the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition. Note that TRIPS does not require that undisclosed information be treated as a form of property.

⁴² Member countries are free to allow the registration of signs, like sound or smell that are not visually perceptible. As an additional condition for eligibility for registration as a trademark, member countries are allowed to require that the relevant goods or services have become distinct through use, if such signs are not inherently distinctive of the relevant goods or services.

⁴³ TRIPS requires service marks to be protected in the same way as marks distinguishing goods (see for example Articles 15.1, 16.2 and 62.3).

⁴⁴ Article 14.3 of TRIPS.

without the owner's consent, the trademark in the course of trade.⁴⁵ The owner must also have the right to exclude use of identical or similar signs for goods or services that are identical or similar to those in connection with which the trademark is registered, when such use would result in a likelihood of confusion.⁴⁶ In case of the use of an identical sign for identical goods or services, member countries' laws must provide that a likelihood of confusion is to be presumed.⁴⁷

TRIPS contains certain provisions on well-known marks, which supplement the protection for such marks under the Paris convention.⁴⁸ The Paris Convention provision obliges member countries to refuse or cancel the registration and to prohibit the use of a mark conflicting with a mark that is well known. It is required that member countries' laws take into account that a mark's being well-known in the relevant sector of the public may be by means other than as a result of use in connection with products or services. One such means might be the promotion of the mark apart from its use.⁴⁹ Moreover, TRIPS requires that protection of registered well-known marks must cover goods or services that are not similar to those in connection with which the well known has been registered.⁵⁰ However, such protection is to be made available only if use of the mark indicates a connection between those goods or services and the owner of the registered trademark and if the interests of the owner are likely to be damaged by such use.⁵¹

Member countries may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.⁵²

TRIPS requires that the laws of WTO member countries provide for a trademark registration term of no less than seven years for initial registration and each renewal of registration. The laws are

⁴⁵ Article 16.1 of TRIPS.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Article 6*bis* of the Paris Convention.

⁴⁹ Article 16.2 of TRIPS.

⁵⁰ Article 16.3 of TRIPS.

⁵¹ *Id.*

⁵² Article 17 of TRIPS.

to provide for registrations to be renewed over and over again, indefinitely.⁵³ A mark can be cancelled, however, on the grounds of non-use, but to conform to TRIPS requirements, such cancellation cannot take place before three years of uninterrupted non-use has elapsed, unless the trademark owner can show valid reasons, based on the existence of obstacles to such use.⁵⁴

Member countries must confine limitations or exceptions to exclusive rights in trademarks to special cases that do not conflict with a normal exploitation of the trademark and do not unreasonably prejudice the legitimate interests of the trademark holder.⁵⁵

TRIPS Enforcement Mechanisms

Many developing countries adhere to the Paris and Berne Conventions. Many developing countries already provide minimum standards of intellectual property protection on a national treatment basis. What TRIPS provides that is so missing under the laws of developing countries is the requirement that member countries have enforcement mechanisms to make these rights a legitimate tool in licensing markets. TRIPS provides general obligations aimed at meeting basic principles of due process and ensuring the effectiveness of enforcement procedures.⁵⁶ The basic principles require that en-

⁵³ Article 18 of TRIPS.

⁵⁴ Article 19 of TRIPS. Valid reasons include circumstances arising independently of the will of the owner of the trademark, such as import restrictions or other government restrictions. Use of a trademark by another person, when subject to the control of its owner, must be recognized as use of the trademark for the purpose of maintaining the registration.

⁵⁵ Article 13 of TRIPS.

⁵⁶ Article 41 of TRIPS. Requirements for due process are found in the 2nd, 3rd and 4th paragraphs of Article 41. These paragraphs require that enforcement be fair and equitable, that they not be unnecessarily complicated or costly, entail unreasonable time limits or involve unwarranted delays. Decisions on the merits of cases are preferably to be reasoned, in writing and, available at least to the parties to the proceeding without undue delay. The decisions are to be based only on evidence about which the parties were offered the opportunity to be heard. The parties to a proceeding must be given an opportunity to review by a judicial authority of final administrative decisions and at least the legal aspects of initial judicial decisions on the merits of a case, subject to jurisdictional provisions in a member's law concerning the importance of a case.

forcement procedures are to be available to all right holders and applied in such a manner as to avoid abusing rights and creating barriers to legitimate trade.⁵⁷ TRIPS requires that member countries carry out these obligations with civil and administrative procedures and remedies,⁵⁸ provisional measures,⁵⁹ and special requirements

⁵⁷ Article 48 of TRIPS provides that the judicial authorities must have the authority to order an applicant who has abused enforcement procedures to pay an adequate compensation to the defendant who has been wrongfully enjoined or restrained to cover both injuries and expenses, including appropriate attorney's fees. Public authorities and officials are exempted from liability to appropriate remedial measures only where actions are taken or intended in good faith in the course of the administration of that law.

⁵⁸ Article 42 of TRIPS contains certain principles aimed at ensuring due process, including notice requirements, representation by independent legal counsel, and prohibitions against overly burdensome requirements on mandatory personal appearances. Article 43 deals with application of rules of evidence, including empowering courts to order a party in possession of evidence to produce that evidence and to make their decisions on the basis of information presented to them, if a party refuses access to evidence without good reason. Article 44 requires that the courts be empowered to order injunctions against infringements, including importing infringing goods into domestic distribution channels. Article 45 provides that the courts must be empowered to order an infringer to pay the right holder adequate damages — in appropriate cases, recovery of profits or pre-established damages — and expenses, including appropriate attorney's fees. Article 46 requires that the judicial authorities be empowered to order to order that infringing goods, as well as materials and instruments predominantly used in the production of the infringing goods, be disposed of outside the channels of commerce or, where constitutionally possible, destroyed. Article 47 permits member countries to authorize judicial authorities to order an infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

⁵⁹ Article 41 of TRIPS requires that enforcement procedures must expeditious remedies. Article 50 requires each member country to ensure that its judicial authorities have the authority to order prompt and effective provisional measures for any intellectual property right. These measures should be available to prevent an infringement from occurring, and to prevent infringing goods from entering into the channels of commerce without prior hearing of the other side, where appropriate. Nevertheless, the parties must be given notice, without delay after the execution of the measures at the latest. The defendant must have a right to review and petition on whether these measures should be modified, revoked or confirmed.

related to border measures,⁶⁰ and criminal procedures.⁶¹

TRIPS distinguishes between infringing activity and counterfeiting⁶² and piracy⁶³ activities. Counterfeiting and piracy are considered the more egregious and blatant of infringement activities, requiring more than civil judicial procedures and remedies, which TRIPS requires to be available for all infringements. Accordingly, TRIPS provides for border measures and criminal procedures as additional enforcement procedures against counterfeiting and piracy.

TRIPS provisions on enforcement do not create any obligation to put in place a judicial system for the enforcement of intellectual

⁶⁰ Article 51 of TRIPS requires that goods subject to border enforcement procedures must include at least counterfeit trademark and pirated copyright goods that are being presented for importation. *See* notes 63 and 64, *infra*. Member countries are free to decide whether to include imports of goods that involve other infringements of intellectual property rights. Member countries are also free to determine whether to apply these procedures to parallel imports. And member countries may exclude from the application of these procedures small quantities of goods of a non-commercial nature contained in travelers' personal luggage or sent in small consignments. The basic mechanism required by TRIPS is that each member country must designate a "competent authority", which could be administrative or judicial in nature, to which right holders for customs action shall submit applications, provide adequate evidence of a *prima facie* infringement, and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. Article 52 requires the competent authorities shall then inform the applicant whether the application has been accepted and, if so, for what period, and give the necessary directions to customs officers. The responsibility is on applicant to initiate proceedings leading to a decision on the merits of the case. The provisions on border measures require essentially the provisional measures against imports of infringing goods, with many of the same safeguards against abuse. *See generally* Articles 50-61 of TRIPS.

⁶¹ Article 61 requires provision to be made for applying criminal procedures at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. TRIPS leaves it to member countries to decide whether to provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights. Sanctions must include imprisonment, monetary fines, or both sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity. Criminal remedies in appropriate cases must also include seizure, forfeiture, and destruction of the infringing goods and of materials and instruments used to produce them.

⁶² Counterfeit goods are in essence goods involving slavish copying of trademarks.

⁶³ Pirated goods are goods that violate a reproduction right under copyright or a related right.

property rights distinct from that for the enforcement of law in general. Member countries are not required to enforce or prohibiting from enforcing their law outside of the strictures of TRIPS.

Anti-competitive Practices in Licensing Intellectual Property Rights

An important consideration to be made with respect to TRIPS standards on developing countries is that some licensing practices or conditions pertaining to intellectual property rights restrain competition in such a way that it may have adverse effects on trade and impede the transfer and dissemination of technology. TRIPS allows member countries to adopt measures consistent with the other provisions of TRIPS to prevent or control abusive and unnecessarily anti-competitive in the licensing practices. TRIPS provides a mechanism that will allow a member country seeking to take action against such practices involving the companies of another member country. The mechanism allows one member country to enter into consultations with the other member country and exchange publicly available non-confidential information relevant to the practice in question and such other information that is available to that member country. This exchange of information is subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of any confidentiality that would be given the requesting member country.⁶⁴

Conclusion

TRIPS provides potential benefits for developing countries by providing a framework that is conducive to domestic research and technology transfer and increased foreign development. These benefits should outweigh the increased costs of investment. To be brought into the community of nations that form the membership of the WTO, developing countries seem to be willing to meet the additional administrative burdens of enforcing intellectual prop-

⁶⁴ See generally Article 40 of TRIPS.

erty rights under TRIPS. Developing countries know that there will be potentially higher royalty payments and adjustment costs for industries that, in the absence of strong domestic intellectual property laws, were producing goods that would be considered as counterfeit. Developing countries also understand that requirements for adequate patent laws may well mean an increase in prices of certain goods in their markets. Software products may well be an example of this. But these increases are expected to be small, and TRIPS itself has provisions for minimizing adverse implications for developing countries.

Developing countries, countries in the process of transformation from a centrally planned into a market economy, and least-developed countries are in a transition period for bringing their legislation and practices into conformity with TRIPS.⁶⁵ Industrial countries had one year to meet their obligations, while developing countries have had generally five years to the year 2000, and least-developed countries have up to eleven years from January, 1995, with the possibility of an extension. U.S. policy was to shorten this transition period by negotiation with and training of officials of developing countries for appreciation of the benefits intellectual property laws and procedures under a TRIPS regime.

For businesses of developing countries, conducting trade according to multilaterally agreements rather than by relying on the protection of their countries' insular laws is a significant advantage. Businesses from other countries will not enter into trade without protection for their intellectual property rights. Without a multinational agreement in place the protections can only result from bilateral negotiations between countries, and developing countries are at a disadvantage in such negotiations. Thus, for the national businesses, which would include the software businesses of developing countries, one of the most important aspects of TRIPS is that it politically forces a substantial strengthening of the national intellectual property laws to accommodate multinational trading activity. This accommodation further increases the importance of the rules-based system for developing countries. A consequence of this is that for rules to be effective on the multinational playing field, there must be efficient and equitable means to settle disputes in the event

⁶⁵ See Articles 65-66 of TRIPS.

of a breach of obligations by a WTO member country. The WTO, which administers TRIPS provides for such a dispute settlement mechanism.⁶⁶

⁶⁶ The dispute resolution forum of the WTO is for member countries and not for the businesses that in most cases precipitated the disputes. In a speech before the WTO in Geneva in 1998, President Clinton focused attention on the need to open WTO dispute resolution processes to public scrutiny and involvement. By indicating the willingness of the United States to subject all WTO disputes involving the U.S. to transparent public process, President Clinton laid down a challenge to member countries of the WTO. As the procedures are now used, national businesses complain to their governments, often under the representation of private lawyers. The lawyers stay in the background, but write briefs and advise the member country officials as they present their cases to the WTO. Accordingly, there is a proxy representation of business disputes.

Teaching Intellectual Property in Developing and Transitional Countries in the Wake of TRIPS

KARL F. JORDA

*David Rines Professor of IP Law
Franklin Pierce Law Center
Concord, New Hampshire, USA*

Introduction

ON 48 trips over the past ten years, I have had the opportunity to give 102 talks:

- To developing and transitional country audiences, such. as government officials, personnel of IP offices, IP practitioners, industry managers, judges, academicians, students.
- On topics, such as, the nature and importance of Intellectual Property Rights (IPRs), the role of IPRs in economic development, IP licensing and technology transfer, teaching IP law.
- In 30 countries from Argentina, Ecuador and Panama to Madagascar, Mongolia and Indonesia.
- Under the auspices of WIPO, UNTNC, USIS, USAID, local and regional associations, and so on, or on my own initiative, as well as to developing and transitional country audiences,

who attended IP programs at WIPO in Geneva, the USPTO in Washington, Franklin Pierce Law Center in Concord, New Hampshire, and other institutions.

Challenges in Developing and Transitional Countries

ATTENDING and participating in such programs and being able to “spread the gospel” of IPRs in the face of considerable skepticism, were very interesting and gratifying but also challenging experiences. Excerpts from just two trip reports about visits to (a) Guatemala and Costa Rica in 1995; and (b) Islamabad, Lahore and Karachi in Pakistan in 1997 will illustrate this perfectly.

The key points which I tried to convey in lectures and discussions on missions to these countries and which were culled from my special list of “Credos - Insights Truisms about Intellectual Property Rights” (see Attachment) were the following:

- The defense of intellectual property rights today is the new frontier as were the human rights yesterday.
- An effective intellectual property system is indispensable to technological and cultural development which in turn is indispensable to economic growth and social welfare.
- There is solid correlation between the quantity of investments a country can attract from abroad and domestically and the quality of its intellectual property systems.
- An intellectual property system should be part of a country’s infrastructure from the outset rather than something thought about after reaching a fairly advanced state of development.
- An intellectual property system does benefit nationals, not just foreign corporations; after all, there is genius and creativity everywhere but they need nurture.
- Of the several incentives provided by the intellectual property system, namely, to invent or create, to disclose, and to invest, the incentive to invest is the most important.

- “Everything under the sun made by man is patentable”, according to the U.S. Supreme Court; hence, there should be no exclusions of subject matter from patentability.
- Subject matter that is viewed as too important to be protected, like pharmaceuticals and products of biotechnology, is on the contrary, too important not to be protected.
- A patent and other intellectual property are property and are not and cannot be monopolies, primarily for the reason that a monopoly is something in the public domain that the government takes away from the public; an invention, on the contrary, is something novel that was not in the public domain but will later enter the public domain and be freely available.
- Technology transfer, licensing and investments are ever so much easier to carry out and accomplish via patents and other intellectual property rights as vehicles or bases.

In concluding my talks, I proposed and advocated implementation of a six-phase, overlapping course of action to improve their IP systems, as follows:

- Modernization and strengthening of national IP legislation.
- Installation of an effective IP administration, adherence to all relevant and important international IP treaties.
- Instillation of appreciation in all sectors of the importance of IP in economic and cultural development.
- Improvement of judicial mechanisms for the enforcement and defense of IPRs.
- Establishment of regional, centralized IP systems and offices.

I was pleased that some of my more telling points resonated with the audience and other speakers. For example, there were expressions of understanding and endorsement of my infrastructure and property-nature arguments, my point about inventive genius

existing everywhere, the quality of an IP regime and the quantity of investment being correlated, and so on.

On the other hand, however, skeptical comments and testy questions abounded, for example:

- Copying and imitation are basic human traits and nothing can be done about it (strong Robin Hood syndrome).
- The U.S. left the Japanese alone when they copied U.S. products, but turns on us.
- With the free flow of goods there should be free flow of information and technology as a matter of human rights.
- The degree of respect for IPRs should depend on the degree of economic development.
- A patent system that is rooted in America should not have to be adopted in other countries.
- A country should be free to participate or opt out; millions don't have access to medicines and enforcement of IPRs would make it worse.
- Developing countries need assistance and forbearance, especially those that were exploited by colonial masters.
- Western IP policies are unfriendly and barren of compassion.
- The U.S. should use more the carrot than the stick.
- IPRs should be shared, even if, or especially if, they are property.

It was not always easy to respond to such comments and questions, coming out of the blue. Particularly tricky was this question: If a patent is a contract between an inventor and his government and grants protection in exchange for disclosure, why should a foreign country also grant protection later when there is no quid pro quo? (Answers: 1. benefits are world-wide, and 2. reciprocal national treatment.)

Based on my conversations and observations in these and other developing countries, I believe the biggest challenges and problems have to do with the fact that there is, as a general rule, not only appalling ignorance but also glaring misconceptions about IPRs and their role in technological development and economic growth; their IP offices are understaffed, underfinanced and hence inadequate and there is no culture for intellectual property, little teaching of the subject in universities and no enforcement which leads to rampant piracy.

Illicit copying and lack of enforcement have the following unfortunate consequences:

- Foreign owners of IPRs stay out of the country - they won't build plants, ship in and license local distributors.
- Home-grown taxpaying channels of distribution are not developed. The tax base doesn't grow and taxes are not paid where piracy is rampant.
- Markets are flooded with inferior illegitimate products and technology is not incorporated in the country's technology base and infrastructure. There is no technical support.
- Development of a country's industries is impeded. Local inventors and authors can't make a living from their work. Local IP is less likely to be created and suffers.
- Countries are in non-compliance with requirements of international laws and face trade sanctions.
- The basic shared moral proposition that it is not proper to take someone's work and effort without payment, is violated (*see* Jonathan Zavin et al., "The Value of Intellectual Property Rights Enforcement in Developing Countries", *Economic Perspectives*, June 1997).

Modern and strong IP systems should be of interest for all nations, including the smallest and also the least developed. For this reason, such systems are being adopted around the globe. Many developing and transitional countries established or strengthened

their intellectual property systems before the GATT-TRIPS era and without being swayed by pressures from the outside, because they had come to realize that IP systems would serve their own self-interests.

For example, a high official of the Indonesian Government made the following statements in a seminar, which I attended in Jakarta a few years ago when I served as a consultant for the Patent, Trade-mark and Copyright Office, to assist them in implementing their first patent system:

“The need to expand our knowledge and to improve our technological development and dominance require a greater availability of technological information through growth and development of the patent system. Only through the expansion of knowledge, and the increase in technological dominance, will we be able to carry out efficiently the process of technology transfer as well as solve related problems.

Especially today one cannot ignore the role that intellectual property plays in international markets, which is becoming increasingly more important.

The future economic development of the country will focus more and more on the industrial sector directed to exports, which obviously will need access to international markets. This access will only be achieved if we participate in mutual agreements in the sector of intellectual property, through the operation of sufficient, efficient and reciprocal legal protection.

The current situation, where intellectual property has greater value and more importance provides a very different stage from that of the fifties, sixties or even the seventies.”

In my opinion, these affirmations - and similar ones which I heard on subsequent trips to Korea and Malaysia - are very positive, modern, and at the same time surprising, since until 1991 there was no patent system in Indonesia. Furthermore, these statements have much relevance in other developing countries because there is considerable parallelism among many of them and Indonesia.

The realization has also set in developing countries that the negative consequences of inadequate IP protection are affecting economic development. During a visit at Shalimar Recording Company, Islamabad, on my mission to Pakistan, Mr. Khalid Hassan, its CEO, lamented the fact that pirates were driving recording and publishing companies out of business, his company being down to 11 from

400 employees and another company already having folded completely.

Lawsuits are very slow, there are no injunctions, and damage awards and penalties are rather nominal, so it is hard to stop piracy. But from others I learned that the climate is improving with more effective IP laws being enacted, more raids taking place, and greater IP consciousness in the government and other circles being noticed.

IP Teaching and Training in Developing and Transitional Countries

THE above-mentioned developments and trends are encouraging and the TRIPS-imposed minimum standards for stronger and more effective IP systems in WTO countries cannot help but accelerate these favorable trends. But passing laws is not enough - far from it, although I heard one official in Costa Rica assert: "We passed a law, doesn't that take care of it?" Enforcement is of course indispensable. A law that is not enforced is worse than no law. In this connection I have heard Americans complain: "What good is a law, if it's not enforced!" True, but passage of a law is a requisite first step. Without a law there is nothing to enforce. Thus as stated above in my six-point action program, instillation and appreciation in all sectors of the importance of IPRs in economic and cultural development, is an essential concomitant step for the effective defense of IPRs.

Strategies that have been or could be successful in promoting respect for IP and should be intensified, are in the first place, local educational campaigns and programs, as sponsored by WIPO, USIA, USAID and other international and national organizations. More importantly, however, students and teachers and officials and practitioners in developing and transitional countries should be encouraged and supported to go abroad for IP education and training and enroll in academic IP programs being offered in increasing numbers in law schools and universities in developed countries. One such program is for instance the internationally-acclaimed one-year MIP (Master of IP), half-year DIP (Diploma in IP) or IP Summer Session of Franklin Pierce Law Center, Concord, New Hampshire.

This kind of intensive academic training credentials graduates, enhances employment prospects and “teaches teachers” and is well-suited to foster IP awareness in developing countries. When these students return to their home countries, they have a heightened awareness of how much IP protection promotes invention, innovation and technological and economic progress. Unfortunately, several admitted foreign applicants are being denied visas to study at FPLC every year.

The Future of TRIPS for Developing and Transitional Countries

AN overwhelming amount of literature has been generated in recent years by academics and commentators, interpreting TRIPS and assessing its economic and social implications, in general, and for the developing countries, in particular. Comments range from very positive to quite negative.

On the plus side, according to Bob Sherwood TRIPS is a “blue-print for effective defense of intellectual property rights” (37 IDEA 491, 537 (1997)) and according to former Commissioner of Patents and Trademarks, Gerald Mossinghoff, TRIPS “clearly set the stage for the next steps in effective multinational patent protection.” (38 IDEA 529, 539 (1998)) In fact, he predicts that with the “landmark” TRIPS Agreement in place, we will have a World Patent System “sooner rather than later.” (Id. at 561)

But tensions which have to do with a perceived disconnect between GATT/WTO (trade law) and TRIPS (IPRs) in terms of obligations, vocabulary, etc. are seen by some. “Success will depend on how well the GATT/WTO system addresses the differences between the intellectual property and trade matters.” (Rochelle Cooper Dreyfuss and Andreas Lowenfeld, “Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together” (37 VA J. Int’l L 275 (1997))

J.H. Reichman’s assessment in his article “Enforcing the Enforcement Procedures of the TRIPS Agreement” (37 VA J Int’L L 335, 339 (1997)), is also interesting:

“Taken together, the enforcement and dispute-settlement provisions of the TRIPS Agreement put teeth into the preexisting

intellectual property conventions, which relegated the issue of effective implementation of agreed minimum standards to a purely theoretical possibility of litigation before the International Court of Justice. In the long term, one may well hope that these provisions will further the goal of adapting the international intellectual property system to the challenges of an integrated world market.”

Significant assessments and proposals were advanced by Robert Sherwood in a report commissioned by WIPO in 1995 regarding macro-economic benefits and costs to developing countries in implementing the TRIPS Agreement (37 *IDEA* 491 (1997)).

According to Sherwood “(d)eveloping countries can expect benefits of many kinds as they fully implement the TRIPS Agreement” (Id. at 491). He discusses in great detail the factors that contribute to macro-economic cost/benefit analysis of the implications of TRIPS for developing countries in terms of innovation, price levels, technology acquisitions, human skills, private investment in research, science in agriculture, industrial base, private risk capital and university technology and then concludes:

“On balance, it appears that the impact of the TRIPS Agreement on most developing countries is likely to be slightly negative in the short run (one to two years) and increasingly favorable as local firms and individuals begin to realize the potential benefits for their activities. Public education will play a role in the speed with which the benefits are realized.”

And for some in-between commentary: Jayashree Watal in his article “The TRIPS Agreement and Developing Countries - Strong, Weak or Balanced Protection?” (*J of World Int. Prop.* 281, 282 (1998)) has this to say: The views of some legal experts “...range from interpreting TRIPS as an agreement which ushers in an era of strong intellectual property protection in developing countries to a treaty so full of loopholes as to provide a number of escape hatches to developing countries.”

Nonetheless, he concludes that:

“As more work is done on the economic implications of TRIPS for developing countries, it may become clear that it is unam-

biguously in the interests of such countries to interpret TRIPS at the highest levels of protection of IPRs in order to achieve higher levels of domestic innovation, and attract foreign investment or the latest technologies.” (Id. at 307)

Incidentally, Watal takes issue with the characterization of TRIPS as setting merely minimum standards by asserting that:

“...for developing countries it represents a major change from not only the pre-existing international law on the subject but also from their pre-existing national laws. In this sense, TRIPS represents very high, if not the maximum, standards for intellectual property protection for these countries.” (Id. at 282)

While most of the commentaries are optimistic and positive, a few negative and pessimistic voices have also been heard. For example, according to Marci Hamilton TRIPS is “imperialistic, outdated and over-protective”, as it “attempts to remake international copyright law in the image of Western copyright law.” (29 *Vanderbilt J Transnatl L* 613-614 (1996)) Also noteworthy in this connection is the “Rapid Patent” proposal, recently floated within AIPPI circles in the belief that developing countries can’t possibly live up to TRIPS standards. Under this proposal patent applications would be filed, published and kept pending for 20 years when they go abandoned, unless patentability examinations had been requested by someone during pendency. (The ultimate deferred examination system.)

Conclusion

IN the context of a discussion of the future of TRIPS and IP teaching and training in the wake of TRIPS, WIPO’s Francis Gurry offered his prognosis in *Managing Intellectual Property* (June 2000, p.14), which are a fitting conclusion to be quoted here:

“At some stage, we may have a TRIPS 2 treaty. But it could be two years or 20 years. TRIPS is not cast in stone, but when will it be necessary? At the moment, there is no great pressure. The most important development over the past 10 years has been

the widespread recognition that in an economy where intellectual capital is a source of wealth generation, intellectual property controls. Before the Uruguay round, negotiators didn't know what IP was, but there is now an increasing recognition of its importance. Translating it into a business and governmental strategy is a different question. But we are now every close to a widespread understanding.

The advantage of this is that people appreciate the importance of IP and what is happening and it is easier to get action at the appropriate level. But the disadvantage is that there is no longer a private club where we can talk about IP; we have to deal with a whole new range of people. This means we have to become more effective communicators, and explain what IP is and why it is needed, in order to answer the critics."

This is a ringing call for intensified efforts for IP teaching and training, especially in developing and transitional countries to enhance appreciation and awareness of the importance of robust IP systems for technological development and economic growth.

ATTACHMENT

CREDOS • INSIGHTS • TRUISMS on Intellectual Property Rights and Technology Transfer

- The defense of intellectual property rights today is the new frontier as were the human rights yesterday.
- An effective IP system is indispensable to technological development which leads to economic growth and social welfare.
- An IP system should be part of a country's infrastructure from the outset rather than something that one thinks about after reaching a fairly advanced stage of development (Robert Sherwood).
- There are no viable alternatives to the present patent system which is the only system "that is compatible with the system of market economy" (Professor Carlos Fernandez-Novoa).
- There is solid correlation between the quantity of investments that can be attracted and the quality of the patent system (Professor Mansfield).
- Of the four incentives provided by a patent system, namely, to invent, to disclose, to "invent around" and to invest, the incentive to invest is the most important.
- An IP system does benefit nationals, not just foreign corporation; after all there is genius and creativity everywhere but they need nurture.
- A patent and other IP are property and are not and cannot be monopolies (a patent does not take from the public and give to the individual; on the contrary, it takes from the individual and gives to the public).

- “Everything under the sun made by man is patentable” (U.S. Supreme Court in the Chakrabarty decision); hence, there should virtually be no exclusions of subject matter from patentability.
- Subject matter that is viewed as too important to be protected (e.g. pharmaceuticals) is, on the contrary, “too important not to be protected” (Professor Thomas Field).
- Some countries have gold, some have oil - and some have technology and those that have gold and oil do not consider them part of the “common heritage of mankind” and accordingly give them away for free (Naboth Mvere, former Controller of IP, Zimbabwe).
- The duration of a patent should be no shorter than 20 years from filing and preferably 25 years or more or provide for patent term restoration to compensate for regulatory and other delays.
- Lead times for commercializing inventions have become longer in all areas and not just the pharmaceutical area and hence conventional periods of three or four years till lapsing or compulsory licensing and short patent terms are badly out of step with present realities.
- Patents and trade secrets are not mutually exclusive but complementary; they “dovetail” (U.S. Supreme Court in the Bonito Boats decision); thus, the question is not whether to patent or to padlock but rather what to patent and what to keep a trade secret and whether it is best to patent and to padlock, i.e. exploit the overlap.
- “Trade secret law and patent law have coexisted in this country for over one hundred years; the extension of trade secret protection (even) to clearly patentable inventions does not conflict with the patent policy of disclosure.” (U.S. Supreme Court in the Kewanee Oil decision).

- Multiple forms of protection can and should be utilized and integrated by exploiting the overlap between the various IP categories, especially in modern fields of technology; this provides fall-back.
- Positions, achieves synergistic effects and thus optimizes exclusivity (Professor Jay Dratler).
- Technology transfers, licensing and investments are ever so much easier to carry out and accomplish via patents and other IPRs as vehicles or bases.
- Importation of technology leads not only to export of products but also to export of adapted, improved technology (reverse technology transfer).
- The days when technology transferors took advantage of transferees (in developing countries) are gone, the realization having taken hold that the only viable license is one that results from a win/win approach and passes the fairness test.